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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6506

SON H. FLEMING, Petitioner

v.

SAM AUSTIN, Warden, Respondent.

Petition for a Writ of Certiorari to the

Supreme Court of Georgia

THIS IS A CAPITAL CASE

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April 13, 1981

QUESTIONS PRESENTED

I. Does it violate the prohibition against cruel and unusual punishment to execute a defendant who:
   A) did not participate in a murder or intend the fatal result;
   B) was not given the benefit of a proper jury instruction on mitigating circumstances; and
   C) was sentenced to death under procedures that were applied arbitrarily?

II. Does it violate petitioner's right to counsel for this indigent petitioner, facing the death penalty, to have been unrepresented at his preliminary committal hearing where important rights were not preserved and where he was prejudiced?

III. Does it violate petitioner's constitutional rights for the State to have introduced the testimony of its agent and petitioner's cellmate who allegedly elicited incriminating statements from the uncounseled and confined petitioner; and where the State failed to disclose to the jury the deal it had made with the agent-cellmate for his cooperation and testimony?

IV. Were petitioner's constitutional rights violated by the statements of the prosecutor and judge impeaching his exculpatory testimony by arguing that he had remained silent at arrest and arraignment?

V. Is it constitutional to execute a defendant who vigorously asserts his innocence, where the trial judge has acknowledged that the evidence does not "foreclose all doubt respecting the defendant's guilt," where the defendant's representation below was a textbook study of incompetence, where his co-defendant received a sentence of imprisonment, and where the defendant's constitutional rights were massively violated at every stage in the proceedings below?

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Constitutional and Statutory Provision Involved

United States Constitution:

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Georgia Code:

> Petitioner's case involves Ga. Code Ann. §27-2534.1. The text of this statute is included in the Appendix.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

SON H. FLEMING, Petitioner

v.

SAM AUSTIN, Warden, Respondent.

Petition for a Writ of Certiorari to the

Supreme Court of Georgia

The petitioner Son H. Fleming respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Georgia entered in this proceeding on October 21, 1981. The order denied petitioner's application to appeal a decision of the Superior Court of Tattnall County, Georgia, refusing a writ of habeas corpus. Petitioner has been sentenced to death on a charge of first degree murder.

OPINION BELOW

No opinion was rendered by the Supreme Court of Georgia. Copies of the Supreme Court's orders regarding the request for habeas corpus, and the opinion by the Superior Court of Tattnall County (not reported), appear in the Appendix hereto. Also included in the Appendix are the opinions of the Supreme Court of Georgia on November 8, 1977, affirming petitioner's conviction and January 24, 1979, affirming the petitioner's death sentence.

JURISDICTION

Petitioner was convicted on a charge of first degree murder on January 26, 1977, in the Superior Court of Lanier County, Georgia, and sentenced to death by electrocution. On November 8, 1977, the judgment of the Supreme Court of Georgia was entered affirming the conviction, vacating the sentence, and ordering a new trial on the question of punishment. Petitioner was again sentenced to death on December 9, 1977, after a change of venue to the Superior Court of Cook County, Georgia. On January 24, 1979, the judgment of the Supreme Court of Georgia was entered affirming the sentence. A timely petition for a rehearing was denied on February 14, 1979. A petition for writ of certiorari was denied by the United States Supreme Court on October 1, 1979. On July 1, 1980, petitioner's application for a writ of habeas corpus was denied by order of the Superior Court of Tattnall County, Georgia. The Supreme Court of Georgia entered an order denying petitioner's application for a certificate of probable cause to appeal the Superior Court's decision on October 21, 1980. A timely motion for reconsideration was denied on November 14, 1980. On January 29, 1981, the Honorable Lewis Powell

of the United States Supreme Court granted an application for an extension of time to file a petition for writ of certiorari to and including April 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

A. Introduction

This case, involving an innocent black defendant awaiting execution on Georgia's death row, raises the most fundamental constitutional questions about the administration of capital punishment in Georgia. Defendant is on death row awaiting execution, 1) despite an acknowledgement by the trial judge himself that the evidence in this case does not "foreclose all doubt respecting the defendant's guilt";*/ and 2) despite the fact that petitioner's far more culpable co-defendant was sentenced to life imprisonment for his far greater role in the crimes at issue. There are grave doubts in this case about the defendant's involvement in the murder of James Giddens. Indeed the only certainties reflected in the record below are that defendant's constitutional rights--pre-trial, during trial, and post-trial--have been massively violated, and that for this defendant to be executed on the basis of this record would make a mockery of the claim that "when a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia 428 U.S. 153, 187 (1976). The pre-trial, trial, and post-trial proceedings in this capital case are a textbook study of incompetence, sloppiness and casual disregard of basic rights. This case would be a mockery of justice even if it were not a capital one. As a capital case, it cannot be permitted to reach its deadly result. This Court must intervene and grant review to save Son Fleming from an unjust and unconstitutional death.

*/ The trial court so stated in its official Report (pg. 4) concerning petitioner's second sentencing trial. (Attached at Appendix G). For a description of the important role this report is supposed to play in facilitating review of the constitutionality of a death sentence, see Gregg v. Georgia, 428 U.S. 153, 167-68 (1976).

Defendant was convicted and sentenced to death on the basis of a jury instruction which invited the jurors to convict him of murder and sentence him to death even if they concluded that he did not fire the fatal shot nor intend the fatal result. Moreover, the only evidence that the defendant personally participated in the actual killing--evidence which the jury was not obligated to believe in order to convict or sentence to death--was a supposed "confession" allegedly made by the defendant to a white inmate who the defendant had never previously met. That inmate volunteered, obviously in exchange for his immediate freedom, to assist the prosecution in eliciting incriminating information from his cellmate and then to testify. The jury was never apprised of this deal, and the inmate was freed immediately after his testimony and has never been heard from since. Defendant vigorously denies that he ever made any "confession" to the inmate and has constantly maintained--both before the alleged confession and afterwards--that he did not shoot the victim or intend the fatal result.

Moreover, the prosecutor was allowed to argue to the jury--in plain violation of this Court's holding in Doyle v. Ohio, 426 U.S. 610 (1976)--that the exculpatory testimony given by defendant at his trials should be disbelieved, since he had not offered his explanations to the arresting officers at the time of his arrest.

It is not surprising, however, that despite his innocence, the defendant--a semi-literate black--was convicted and sentenced to death, since his "defense", both before and at trial, constituted a massive violation of his 6th Amendment right to counsel. The defendant, facing the punishment of death, was not represented by counsel at the pre-trial committal hearing--a crucial stage in the Georgia criminal process. His defense attorneys did not conduct an investigation of the circumstances surrounding the case; filed no discovery motions; were unaware until trial of the existence of all but one of the prior statements made by the defendant to law enforcement officials; did not obtain a copy of the statement

of which they were aware before trial; did not know before trial whether any of the pre-trial statements was accompanied by a waiver of rights; failed to object when the trial judge asked the defendant--really gave judicial testimony--about a prior hearing, in a manner designed to persuade the jury that the petitioner was lying; actually argued to the jury that petitioner was lying in part of his testimony, thereby abandoning their client's interests*/; presented two contradictory theories of defense to the jury, as a result of their failure to investigate or discover the circumstances of the case and their resultant surprise at the evidence at trial; and did not offer any evidence of mitigating circumstances at the sentencing trial, though much was available**/ Because of this massively inadequate representation, both at trial and on direct appeal, the defendant is facing execution without having had his day in court. He is represented before this Court by volunteer out-of-state counsel--who is serving without fee or expenses--because petitioner has been unable to secure representation by a Georgia lawyer, and because this Court makes no provision for the appointment of counsel at the critical certiorari stage, even in capital cases. Ross v. Moffitt, 417 U.S. 600, 617 (1974).

*/ "Now, they [the prosecution] have said much about Son's not telling the truth. I don't know but what I agree with them. . . I don't think Son was beat by those policemen. I don't believe it, not one bit in this world." Tr. 2, at 465.

The following abbreviations for transcript references will be used.

"Tr. 1": for the transcript of petitioner's first trial encompassing conviction and sentence.

"Args. of counsel": for the transcript of the arguments of counsel at petitioner's first trial.

"Tr. 2": for the transcript of petitioner's second sentencing trial.

**/ In addition, trial counsel did not request a change of venue in spite of prejudicial pre-trial publicity and community hostility to the defendant; did not request a hearing on Mr. Fleming's competency to stand trial or any testimony concerning his mental condition; failed to voir dire prospective jurors meaningfully and agreed to excuse jurors with scruples about the death penalty who were not legally excusable for cause; did not object to the prosecutor's repeated references, questions and argument concerning crimes that defendant might have committed, for which he had never been arrested or charged, and allowed the case to go to the jury on incorrect theories of law without objection.

Even if defendant's conviction were not constitutionally tainted--which it most certainly is--his capital sentence cannot stand since the trial court's instruction to the jury invited it to impose the death penalty even if it found that defendant neither fired the fatal shot nor intended the fatal result. The instruction on mitigating circumstances was also constitutionally inadequate. Moreover, the Georgia capital punishment statute itself is unconstitutional, since it provides a harsher penalty--execution--for the killing of a policeman than for the killing of an ordinary citizen; our Constitution does not tolerate a class or caste system under which the lives of certain special citizens are deemed to be more valuable than the lives of other ordinary citizens. Finally, the facts of this case--even taken in the light most favorable to the State, which is not the standard for reviewing capital sentences--do not make out the kind of extraordinarily heinous murder warranting the most extreme penalty. The murder in this case was less heinous than the one at issue in Godfrey, and this defendant's role in the murder--even assuming the accuracy of the disputed "confession" to his cellmate--was no more heinous than Godfrey's role in that murder. Petitioner's co-defendant received a life sentence for his far more substantial participation in the same events. Thus, the roulette wheel of injustice--a roulette wheel unfairly skewed against petitioner in this case--has landed him on death row, while granting his co-defendant the right to live.

In sum, therefore, it must be emphasized that this defendant vigorously asserts his innocence of the crime for which he has been sentenced to die. The trial judge agrees that the evidence--including that presented at the trial and at both sentencing proceedings--does not "foreclose all doubts respecting the defendant's guilt." Significant Constitutional issues are presented by this petition as well--issues going to the validity of the conviction and sentence. Our nation prides itself on never executing innocent persons, and on being "particularly sensitive

to insure that every safeguard is observed" when life is at stake. Here we have a defendant whose vigorous assertion of innocence is supported by the record and by the trial judge's acknowledgement that there are lingering doubts about his guilt. Here we have a defendant whose safeguards were massively violated by the almost casual manner in which his defense and trials were conducted. He has exhausted all review--both direct and collateral--in the State court system. If this defendant is allowed to be killed without review by this Court, these boasts will become hollow mockeries.

B. Facts

Petitioner Son H. Fleming is a 43-year-old semi-literate black male who has been tried and sentenced to death for his alleged role in the murder of James Giddens, the white police chief of Ray City, Georgia. Fleming has spent all of his life in rural southwestern Georgia, where he worked as a common laborer. Prior to the events of this case, his criminal record was limited to convictions for misdemeanors and other minor charges.

On the night of February 11, 1976, two black men robbed a grocery store near Adel, Cook County, Georgia. Shortly after the robbery, Chief Giddens spotted a car that aroused his suspicions. He followed the car, radioed that he was stopping it for investigation, and was never heard from again. Giddens' empty patrol car was found by the side of the road a few minutes later.

Two hours later the suspect car was spotted again, travelling at a moderate rate of speed a few miles from Ray City. Two policemen stopped the car, and ordered the three occupants out. One of them was the petitioner, who was driving the car. The other two were the petitioner's nephew, Larry Fleming, and a friend of the nephew, Henry Willis, both of whom were later identified as the men who had committed the robbery. The policemen asked where Giddens was, and the three replied they didn't know. The policemen

then searched the car, found a bag of money and two handguns, and arrested the three men. Giddens' body was found the next day.

In January of 1977, Son Fleming was tried for his role in Giddens' death. The only evidence linking Fleming with the Giddens killing was the inconsistent testimony of two men who claimed to have been taken into Fleming's confidence. One was Sheriff Ray Alderman, who had known Fleming for 30 years. Alderman testified that he had talked with Fleming, at Fleming's request, several days after his arrest. Fleming allegedly told Alderman that his two passengers had overpowered Giddens after the police chief had ordered their car to the side of the road. Fleming had pleaded with the two to spare Giddens' life, but to no avail. The other man testifying to an alleged confession from Fleming was Ira Bass, a white male serving concurrent sentences for child molestation. Bass, who had never met Fleming prior to their incarceration in the Cook County jail, claimed that Fleming sought him out within hours of his incarceration; that Bass then offered to help the prosecution; and that Fleming eventually confessed, among other details, that he had fired the first (and non-fatal) shot at Giddens. Bass's testimony relating Fleming's alleged confession was the only evidence to show that Son Fleming actively participated in the shooting of Giddens. Without Bass's testimony, the evidence supports petitioner's contention that he is totally innocent. Without the uncorroborated and inherently suspect hearsay testimony of the cellmate-agent, there is no evidence that petitioner participated in the original robbery of the store in Adel, Georgia. Two men--Henry Willis and Larry Fleming--went into the store brandishing the .22 caliber pistol that was later used in the killing. Without the cellmate-agent's testimony, the only evidence is that petitioner was in the car when it was stopped by Officer Giddens; that he pleaded with the others not to kill Giddens; that Giddens ran from the car

and was wounded first at a distance of 40-50 feet by a shot from his own gun; and that Giddens was then killed at close range by Willis who followed Gidden into the pond. The gun used belonged to Willis and had been brandished by him earlier that night. Willis' clothes were found in the trunk of the car. They were wet. Petitioner's clothes were dry. Under these facts, petitioner is simply not guilty of the crime of murder, for which he stands convic ed and for which he was sentenced to die.

The jury found Son Fleming guilty of the murder of James Giddens. At the subsequent sentencing hearing the jury found that the government had proved two aggravating circumstances--that the victim was a police officer in the performance of his duties, and that the death occurred in the course of a capital felony (kidnapping with bodily injury)--and recommended the death penalty. That sentence was overturned by the Georgia Supreme Court because the trial judge failed properly to instruct the jurors that they should disregard portions of the prosecutor's closing arguments and that they could sentence petitioner to life imprisonment even if they found the existence of an aggravating circumstance.

At the second trial held to re-sentence Son Fleming, much of the same evidence was presented to the new jury. Ira Bass, however, was not available to testify. He had been released on probation within days after his testimony at Fleming's first trial, on the recommendation of both Fleming's prosecutor and presiding judge. The Georgia police were unable to locate him to testify at the new sentencing hearing, and his present whereabouts are unknown. The transcript of Bass's testimony from the first trial was read to the jury at the second. The same aggravating circumstances were charged, and Son Fleming was again sentenced to death.

Additional facts are set out where appropriate in the body of this petition.

HOW FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I., III. The arguments that petitioner's death sentence was excessive (the Lockett issue) or disproportionate to the penalty imposed in similar or less serious cases (the Godfrey issue) were rejected by the Supreme Court of Georgia following the second sentencing trial. Fleming v. State, 243 Ga. 120, 123 (1979). The arguments were then raised in petitioner's application for habeas corpus, but rejected by the Court. Fleming v. Austin, unpublished opinion from the Superior Court of Tattnall County, pages 8-9, (1980).

II. At the second sentencing trial, petitioner's counsel objected, once the jury had retired to begin their deliberations, to the emphasis on aggravating circumstances created by the judge's choice of language and the use of the court-supplied forms for reporting aggravating circumstances. No corrective instructions were issued. (Tr. 2, pages 492-493.) The issue was also raised on appeal to the Supreme Court of Georgia following the second sentencing hearing and again in the petition for habeas corpus to the Superior Court of Tattnall County. It was rejected by both courts. 243 Ga. 120, 122. Tattnall County opinion, pages 9-10 (1980).

IV. The failure to provide petitioner with counsel for his committal hearing was raised as soon as new counsel replaced the original court-appointed counsel in the petition for a writ of habeas corpus. It was denied in the court's order. Tattnall County opinion, page 28-29.

V. The claim that the use of Ira Bass's testimony was constitutionally improper because the jury was not informed of the arrangements made to secure the witness's testimony was raised in petitioner's request for habeas corpus, and dismissed by the Court's order. Tattnall County opinion, page 25. The argument that any use of the Bass testimony was a violation of petitioner's Sixth Amendment rights to counsel was not raised below. Direct appeals and the application for a writ of habeas corpus both occurred before the United States Supreme Court handed down its decision in Henry v. United States, which is controlling on the use of government informants in prison.

VI. Objections to the prosecutor's and judge's references to petitioner's post-arrest silence were raised on petition for habeas corpus; the conduct of the judge was addressed in the order denying the petition. Tattnall County opinion, page 19.

REASONS FOR GRANTING THE WRIT

I. This Case Presents a Novel and Important Eighth Amendment Issue: Does the execution of a man not proven to have either actually participated in the killing or to have intended the death of the victim violate the prohibition against cruel and unusual punishment found in the Eighth and Fourteenth Amendments to the United States Constitution?

In Lockett v. Ohio, 438 U.S. 586 (1978), the plurality opinion of this Court expressly reserved the following question: whether, "the death penalty is constitutionally disproportionate for one who has not been proven to have taken life, to have attempted to take life, or to have intended to take life." Id. at 609 n. 16. The facts of this case place that issue squarely before the Court. The issue is not only of crucial importance to petitioner, but may well mean the difference between life and death for many other defendants, for as Justice White noted in his separate opinion in Lockett, ". . .approximately half of the States have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." Id. at 625.

A. Petitioner was convicted of murder and sentenced to death without a jury finding that he actually participated in the killing or intended the death of the victim.

The trial court in this case instructed the jury that it could convict the defendant of intentional murder on the basis of accessorial liability growing out of a conspiracy theory. He instructed the jury as follows: "Where a conspiracy is shown, the act of one becomes the act of all, insofar as the furtherance of the conspiracy is concerned, and each is as fully responsible for the act of the other in carrying out the common purpose as if he, himself, had committed the act." (Tr. 1 at 511). After the jury had begun their deliberations, they asked the judge to explain again the law as to conspiracy. Tr. 1 at 516. The judge complied by repeating the charges he had previously

given as to aiding and abetting and conspiracy. (Tr. 1 at 516.) The prosecutor also repeatedly emphasized that "what one did, the other is guilty of" in both his opening and closing arguments to the jury in the guilt phase of the first trial. (Args. of "Counsel", 14, 28, 34.)

It is equally clear that the sentencing jury need not have found that petitioner himself killed Giddens to sentence him to death. The first statutory aggravating circumstance found by the jury related only to the identity of the victim, the fact that he was a police officer. The second statutory aggravating circumstance was that the murder was committed while the petitioner was "engaged in the commission of another capital felony," the kidnapping of and bodily injury to Giddens. Ga. Code Ann. 27-2534.1(b) 2, 8. Since the jury was never instructed as to what constituted "bodily injury", they could quite easily have assumed that the shooting done by Larry Fleming and Willis constituted the bodily harm. This is particularly possible because the prosecutor once again argued, in both his opening and closing statements, that "The act of one is the act of all." (Tr. 2 at 44, 425)*/ Moreover, the bulk of the state's evidence demonstrated that petitioner did not in fact participate in the actual killing of James Giddens.**/

In light of the trial court's instructions, the arguments of the prosecutor, and the evidence presented, it must be presumed that petitioner has been convicted of murder and sentenced to death even though he himself did not kill Giddens and <u>neither jury believed that he did</u>. Neither jury was required to find that petitioner himself committed

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*/ The same of course can be said for the verdict of the first sentencing jury, as they found the same two aggravating circumstances, were not charged as to the definition of "bodily harm", and heard the prosecutor argue that "what one did they all did." (Args. of Counsel at 71.)

**/ See supra at p. 8, 9.

the killing, and neither jury did so find. Since the jury's verdicts do not reveal whether or not they believed that petitioner killed or intended death, the constitutionality of petitioner's sentence must be reviewed on the assumption that they did not. Bachellar v. Maryland, 397 U.S. 564, 569-571 (1970).*/ This principle applies with special force when someone has been sentenced to die, for "...the qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978).

B. It is a violation of the Eighth Amendment's ban against cruel and unusual punishment to execute someone not proven to have actually killed the the victim nor intended his death.

As noted above, this Court in Lockett explicitly reserved the question of whether death is a disproportionate punishment for one not proven to have actually killed or intended death. However, the Court's opinions, both prior and subsequent to Lockett, have strongly implied that the penalty of death would be unconstitutionally disproportionate for one who has not himself killed or intended to kill. In Gregg v. Georgia,428 U.S. 153 (1976), the Court stated that ". . . when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime." Id. at 187 (footnote omitted) (emphasis added). In Coker v. Georgia, 433 U.S. 584 (1977), the Court held that the death penalty ". . .is an excessive penalty for the rapist who, as such, does not take human life" Id. at 598 (emphasis added). In Lockett itself, the Court held that

*/ A deeply rooted principle of law ". . .requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." Yates v. U.S., 354 U.S. 298, 312 (1957). See Sandstrom v. Montana, 442 U.S. 510, 526 (1979); Street v. New York, 394 U.S. 576, 585-87 (1969); New York Times v. Sullivan, 376 U.S. 254, 284 (1964); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Cramer v. U.S.,325 U.S. 1, 36 n. 45 (1945); Williams v. State of North Carolina, 317 U.S. 287, 292 (1942); Stromberg v. California, 382 U.S. 359, 368 (1931).

the sentencing authority cannot be precluded from considering any relevant mitigating factor, and specifically identified "the absence of direct proof that the defendant intended to cause the death of the victim" and "the defendant's comparatively minor role in the offense" as factors the unconstitutional sentencing procedure had excluded from consideration. Lockett v. Ohio, supra 438 U.S. at 608. Finally, in Green v. Georgia, 442 U.S. 95 (1979), the Court vacated a death sentence because evidence that the petitioner himself had not participated in the murder had been excluded as hearsay. The Court termed this evidence ". . .highly relevant to a critical issue in the punishment phase of the trial. . ." Id. at 97 (emphasis added). See also Lockett v. Ohio, supra 438 U.S. at 613-616 (opinion of Blackmun, J.); id. at 619-620 (opinion of Marshall, J.); id. at 624-628 (opinion of White, J.)

The decision of the Supreme Court of Georgia to let petitioner's death sentence stand without proof that he either actually killed or intended the death of the victim is in direct conflict with the implications of these decisions. If death is an excessive punishment for a rapist, who commits the "ultimate violation of self" short of homicide, Coker v. Georgia, supra, 433 U.S. at 597, it is even more excessive for one who has been sentenced to die under a theory of vicarious liability.

II. The judge's charge to the sentencing jury so emphasized the statutory aggravating circumstances sought by the State and said so little about the mitigating circumstances presented by the defendant that the jury was effectively precluded from giving full consideration to the relevant mitigating factors, in violation of the principle of Lockett v. Ohio.

In Lockett v. Ohio, supra, 438 U.S. at 604, this Court quoted from Woodson v. North Carolina, 428 U.S. 280, 304 (1976), saying "in capital cases the fundamental respect

for humanity underlying the Eighth Amendment. . .requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." In Lockett itself, the Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital cases, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604 (footnotes omitted).

The judges' instructions to the sentencing jury (Appendix H) effectively precluded this constitutionally required consideration of mitigating circumstances. The judge never mentioned the specific mitigating circumstances urged by the defense,*/ and in fact only spent two sentences discussing mitigating circumstances at all. One sentence gave a general definition of "mitigating circumstances" (Tr. 2 at 484), and the other charged the jury ". . .[to] consider evidence as to the mitigating circumstances which the Defendant contends exist in this case." (Tr. 2 at 486).**/

In contrast, the judge gave a detailed recital of the statutory aggravating circumstances sought by the State (Tr. 2 at

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*/ The specific mitigating circumstances proffered by the defense were petitioner's lack of involvement in the actual killing, his low intelligence, and his exemplary conduct in jail. (Tr. 2 at 468-70, 477, 479.)

**/ The judge mentioned the words "mitigating circumstances" in two other places, one when stating that "The law provides that the Judge shall instruct the jury concerning mitigating or aggravating circumstances. . ." (Tr. 2 at 484), and the other in connection with another part of the charge concerning the jury's consideration of statements made by a defendant. (Tr. 2 at 481).

485). He also provided the jury with forms containing the wording of the suggested statutory aggravating circumstances and gave detailed instructions upon the use of the forms. (Tr. 2 at 485, 487-491).*/ He finally stated to the jury "Now, you have two aggravating circumstances. You could find one or two or both, but which ever one you find or if you find both you have to write it in here the ones you find." (Tr. 2 at 490)(emphasis added). Such a lopsided charge in effect tells the jury that the judge gives short shrift to the proffered mitigating circumstances and thus leads to the practical elimination of this "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, supra, 428 U.S. at 304.

Georgia law specifically states that "the judge . . . shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law . . .and any of the following statutory aggravating circumstances which may be supported by the evidence. . ." Ga. Code Ann. §27-2534.1(b).**/ (emphasis supplied). This Court approved the Georgia statute in Gregg v. Georgia, 428 U.S. 153 (1976) in part based upon an understanding that "th[is] statute permitted the jury 'to consider any aggravating or mitigating circumstances.'" Lockett v. Ohio, supra, 438 U.S. at 606. For the judge to fail to charge the jury as to any of the specific mitigating circumstances presented by petitioner not only contravenes the statute, but makes a mockery of the expectations of this Court that were voiced in Gregg and Lockett.

*/ Georgia law requires that "the statutory instructions as determined by the judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation." Ga. Code Ann. §27-2534.1(c).

**/ Despite this plain mandate of the statute, the Georgia Supreme Court has ruled that the trial court need not charge the jury as to the specific mitigating circumstances proffered by the defendant. Spivey v. State, 241 Ga. 477, 246 S.E.2d 288, 291 (1978), cert. den. 439 U.S. 1039 (1978). The rationale for this ruling was that ". . .Georgia law nowhere defines mitigating circumstances. . . The conclusion is inescapable that the legislature meant to empower the jury to consider as mitigating anything they found to be mitigating, without limitation or definition." Id. at 290-291. This reasoning would seem to lead, however, to the further conclusion that the trial court is required to instruct the jury on all the mitigating circumstances argued by the defendant, rather than not required to instruct them on any.

III. Petitioner has been sentenced to death under procedures that were applied arbitrarily and capriciously, and for a crime that is not distinguishable on a principled basis from crimes that are not punished by death, in violation of Godfrey v. Georgia.

In Godfrey v. Georgia, 100 S.Ct. 1759 (1980), this Court stated that it "is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice and emotion." Id. at 1767, quoting from Gardner v. Florida, 430 U.S. 349, 358 (1977). Two corollaries of this principle were reaffirmed by Godfrey. The first is that a State "has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." Godfrey v. Georgia, supra, 100 S.Ct. at 1764. The second is that "[a] capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" Id., quoting from Gregg v. Georgia, 428 U.S. 153, 188 (1976). Because these constitutional mandates have been violated in petitioner's case, this Court must vacate petitioner's sentence of death.

A. Petitioner's Death Sentence is the result of an arbitrary and capricious application of Georgia's capital sentencing procedures.

In Godfrey v. Georgia, supra, this Court said that a State ". . .must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Id. at 1764-65 (footnotes omitted). In striking down the overly broad application of one of Georgia's aggravating circumstances to Godfrey, the Court stated that "[t]he other statutory aggravating circumstances upon which a death sentence may be based. . .are considerably more specific or objectively measurable than

[the aggravating circumstance at issue in Godfrey.]." Id. at 1762, n. 2. Even if the other statutory aggravating factors may appear to be "specific" and "measurable", the random manner in which Georgia has applied them has resulted in the totally arbitrary infliction of the death penalty upon the petitioner, as is demonstrated by comparing petitioner's case with those of his co-indictees--as well as with the facts in the Godfrey case.

In this case, three defendants, petitioner, Henry Willis, and Larry Fleming, were separately tried for and convicted of the murder of James Giddens. The jury in Larry Fleming's case was charged as to three aggravating circumstances. The first was that the victim was a police officer, the second was that the murder was committed to avoid lawful arrest, and the third was that the crime was "outrageously or wantonly vile. . ." Ga. Code Ann. 27-2534.1(b) 7, 8, and 10. The jury made no finding as to the existence of any of these aggravating circumstances and sentenced Larry Fleming to life in prison. Petitioner, on the other hand, who from all the evidence in the record was far less culpable than Larry Fleming, was sentenced to die by another jury for committing--at worst--the same crime. Petitioner's jury found as an aggravating circumstance that the victim was a police officer (not found by Larry Fleming's jury although the victim was the same) and that the murder was committed in the course of another capital felony, an aggravating circumstance not even presented to Larry Fleming's jury. Such procedures and results in the same case are stark evidence that Georgia has not fulfilled its "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."*/ Godfrey v. Georgia, supra at 1764.

*/ In the case of the third defendant, Henry Willis, who was the actual gunman who personally "executed" Giddens, the jury was charged as to the same three aggravating circumstances that were presented in Larry Fleming's case. Willis' jury found the existence of all three and sentenced Willis to die. Willis v. State 243 Ga. 185, 253 S.E.2d 70, cert. den. 100 S.Ct. 178, reh. den. 100 S.Ct. 475 (1979).

A comparison of the facts of petitioner's case with those in Godfrey itself underscores this arbitrariness. After a telephone argument with his estranged wife, Godfrey took his shotgun to the trailer where his wife was playing cards with his mother-in-law and his 11-year-old daughter. He proceeded to shoot his wife in the head, strike his young daughter with the gun, and shoot his mother-in-law in the head. Id. at 1763.

The total arbitrariness of the Georgia capital punishment scheme is shown by the fact that in Georgia, a murder may be punishable by death if it ". . .was committed while the offender was engaged in the commission of another capital felony." Ga. Code Ann. 27-2534.1(b)(2). The two murders in Godfrey occurred within such a short period of time of each other that it seems clear that under Georgia law, one murder could have served as an aggravating circumstance for the other. See, e.g. Peek v. State 239 Ga. 422, 238 S.E. 2d 12, cert. den., 439 U.S. 882 (1978) (second murder was aggravating circumstance for first murder). If Godfrey had been convicted of one murder and sentenced to death on two aggravating circumstances, instead of being convicted of two murders and sentenced to death on one aggravating circumstance, he might now be dead. However, the judge apparently did not charge the jury that this aggravating circumstance could be found, and in any case, it was not so found. Godfrey, supra at 1764. Surely life and death should not, and under Furman cannot, hang on such chance or discretionary use of aggravating factors.

B. Petitioner's death sentence must be vacated because "there is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra at 1767.

In Gregg v. Georgia, supra, this Court stated that "...the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Id. at 184 (footnote omitted). The

Court emphasized its belief that the "extreme sanction [was] suitable to the most extreme of crimes," id. at 187, by reaffirming in Godfrey that "[a] capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" Godfrey v. Georgia, supra, 100 S.Ct. at 1764, quoting Gregg v. Georgia, supra, at 188.

No such meaningful basis exists in this case. There is nothing in the facts of this case to make it any more heinous or deserving of the extreme penalty than in the facts of the approximately 20,000 murders and 100 murders of policemen that occur in this country every year. Every killing is a tragedy; every killing of a police officer is a tragedy. This case did not involve lingering torture, multiple murder, or other factors which would make it more monstrous than the vast majority of murders that are not punished by death. Indeed, the Supreme Court of Georgia described the crime in this case as "...an uncomplicated murder of a police officer..."*/

The fact that the victim was a police cfficer cannot, by itself, constitutionally transform this crime into one deserving of death. It is a fundamental tenet of the U.S. Constitution--and of American society in general--that all people are equal. We eschew castes, classes and statuses. Punishment may not differ on the basis of the race, gender or religion of either the perpetrator of the crime or his victim. Yet the Georgia capital punishment statute carries, in effect, a different penalty for the murder of a policeman than for the comparable murder of an ordinary citizen. This is a return to the discredited days of the vergelt, under

*/ Willis v. State, 243 Ga. 185, 253 S.E.2d 70, 71, cert. den. 100 S.Ct. 178, reh. den. 100 S.Ct. 475 (1979).

which the lives of different persons were valued differently. The lives of all people in this country are worth precisely the same, regardless of status, wealth or occupation. It cannot constitutionally be a more serious crime--or a crime punishable by a more serious punishment, especially the punishment of death--for a defendant to murder a policeman than to murder an "ordinary" citizen.*/

Moreover, there are no compelling social reasons for such a distinction. The fact that policemen are engaged in the risky occupation of protecting the public cannot justify the distinction; indeed the distinction, if permissible, would seem to operate in precisely the opposite direction. The policeman's family--if there is a family--is far better prepared, both emotionally and financially, to cope with the death of their breadwinner than would be a comparable family, not affiliated with the police, whose breadwinner were to be murdered. Provisions are made for insurance and other benefits for the survivors of policemen killed in the line of duty; no such provisions are typically made for non-policemen.**/

If the murder in this case had involved an ordinary citizen, rather than a police officer, it would clearly come within the principles of Godfrey. The fact that it involves a police officer cannot permit a different result. But even if the killing of a police officer could convert a non-capital

*/ If a state could punish the murder of a policeman more harshly than the murder of an ordinary person, could it establish a series of graded punishments depending on the occupations, worth, educational status, etc. of the victims? Surely such a caste system, employed in other countries and at other periods of history, would be repugnant to equal protection.

**/ Likewise, the fact that the jury found that petitioner was engaged in another capital felony at the time of the murder does not distinguish this case from the vast number of murders that are not punished by death. The State did not even bother to present this aggravating circumstance to the juries that tried the other men indicted for the same crime. (See supra at 18). Such an apparently random selection of this factor belies any contention that its invocation provides a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra, at 1767.

crime into a capital crime, the state must justify why this particular police killing is more deserving of death than the many police killings that do not result in execution. This case was, in the words of the Georgia Supreme Court, "an uncomplicated murder of a police officer..." Willis v. State 243 Ga. 185, 253 S.E. 2d 70, 71, cert. den. 100 S.Ct. 178, reh. den. 100 S.Ct. 475 (1979). Indeed, the facts of this very case--where one of the co-defendants in the very same crime received a sentence of life imprisonment for his more substantial participation in the identical killing of the same police officer--vividly illustrate the roulette wheel nature of Georgia's process of imposing death.

IV. Petitioner's lack of Counsel at his preliminary committal hearing violated his Sixth and Fourteenth Amendment right to counsel as set forth in prior decisions of this Court.

The record establishes that petitioner was unrepresented at his preliminary committal hearing in this capital case, thus requiring automatic reversal under the governing case law. An adversarial preliminary hearing is a critical stage of criminal prosecution. Consequently, the Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to counsel to the accused at the hearing. Coleman v. Alabama, 399 U.S. 1 (1970). The Georgia Supreme Court has recognized that Georgia's preliminary committal hearing is a critical stage of the prosecution, at which counsel must be appointed for an indigent defendant. State v. Hightower , 236 Ga. 58, 222 S.E.2d 333 (1976); State v. Houston, 234 Ga. 721, 218 S.E.2d 13 (1975).

In Hamilton v. Alabama 368 U.S. 52 (1961), this Court held that when a capital defendant is denied counsel at a critical stage in the proceedings against him, his conviction will be reversed without inquiry as to whether or not prejudice resulted. Id. at 55. See also White v. Maryland, 373 U.S. 59 (1963). These holdings were reaffirmed in Holloway v. Arkansas, 435 U.S. 475 (1978), where the Court stated ". . . when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during

a critical stage in, at least, the prosecution of a capital offense, reversal is automatic. Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963)." Id. at 489 (emphasis added).

Petitioner was arrested on February 12, 1976, and was detained thereafter without bond. On May 14, 1976, a committal hearing was conducted against him and against the two other men who had been indicted for the same crime, Larry Fleming and Henry Willis. Larry Fleming and Henry Willis were represented by retained counsel, attorney Millard Farmer. Petitioner was represented by no one.*/

On August 12, 1976--3 months after the committal hearing--attorney Reece Franklin was appointed, but he did not represent Mr. Fleming, and the record is silent as to why not. On August 24, 1976, attorney Edward Parrish was appointed for the petitioner. Beginning on September 12, 1976, attorney Benjamin Zeisman began assisting Mr. Parrish at the request of the petitioner's mother. Thus Mr. Fleming first received counsel over six months after he was arrested and over three months after he was forced to stand alone at the committee hearing. Therefore, under the standards enunciated in Hamilton v. Alabama, supra, and Holloway v. Arkansas, supra, petitioner's conviction must be reversed. **/

*/ Exhibit I in the Appendix contains the title page from the transcript of the committal hearing. Although Millard Farmer is listed as "Attorney for Defendants", Mr. Farmer has at no time represented petitioner.

**/ It is apparent that petitioner in fact suffered substantial harm because he was unrepresented at the hearing. It was at the committal hearing, and only there, that the District Attorney allegedly tendered a copy of Mr. Fleming's prior statement to law enforcement officers about the crime (Tr.1,332) Since petitioner was not represented by counsel, neither he nor his subsequently appointed attorney received copies of the statements. Petitioner's attorneys first learned of the existence of all but one of the statements during the trial, and had not prior to that time seen the contents of any of them, including the signed waivers of rights. (Tr. 1, 313-14, 331, 414). In addition, witnesses who later testified at petitioner's trial testified at the committal hearing. Inconsistencies between their statements, which could have been used to impeach them at trial, were lost to the defense. Finally, of course, the extent to which an attorney could have developed and preserved evidence favorable to petitioner can never be known.

V. Petitioner's constitutional rights were violated by the admission into evidence of incriminating statements allegedly made by the uncounseled petitioner to his cellmate-government agent, and by the prosecutor's failure to disclose the fact that the cellmate's cooperation and testimony was the result of a deal for favorable treatment.

Witness Ira Bass was a white male who had been incarcerated in the Cook County, Georgia jail in September, 1975 following his arrest and indictment for two counts of child molestation. (Tr. 2 at 215). On February 9, 1976, he pleaded guilty and was sentenced to serve two concurrent four year prison terms, followed by three years probation. (Tr. 2 at 214). On February 13, 1976, Son Fleming was committed to the same general inmate area where Ira Bass was held. (Tr. 2 at 297). The following morning, February 14, Ira Bass sent the jail warden a note that he had information on the death of Chief Giddens (Tr. 2 at 287). His first meeting with jail officials came that same afternoon (Tr. 2 at 287); the next day, February 15, he met with the police and district attorney who were investigating Giddens' death. (Tr. 2 at 315).

Over a period of "several days" (Tr. 2 at 285) Fleming allegedly provided Bass with a detailed description of the night of February 11. There were no witnesses to the purported conversations: Bass testified that Fleming would stop the conversation whenever another inmate drew near. (Tr. 2 at 287). Petitioner denies that any of the purported conversations with Bass ever occurred. There was no corroboration either of the claim by Bass that the conversations occurred or of the incriminating content of the purported admissions allegedly made by petitioner to Bass.

Once Bass met with government authorities on February 14, the day after petitioner's incarceration, to discuss the information he could obtain about Giddens' death, he acted as a de facto government agent and informant.*/ This brings his

*/ At trial, the government failed to distinguish between 1) information that Bass allegedly secured in the brief one-day interval between Fleming's incarceration and the first meeting with prison officials, and 2) information allegedly obtained during the following two weeks before Bass was removed from the Cook County jail. Therefore, all of the Bass testimony suffers from the same constitutional infirmity.

testimony squarely under the rule established by the Supreme Court in United States v. Henry, 100 S.Ct. 2183 (1980).

A second constitutional defect created by the introduction of Ira Bass's testimony at Son Fleming's first trial was the government's failure to apprise the jury of the arrangements made with Bass to secure his assistance and testimony. Bass was asked on the witness stand what promises the government had made in exchange for his testimony. He responded that the only promise tendered for his co-operation was that he would not be sent to the State prison at Reidsville, where he feared reprisals for testifying against a black inmate. (Tr. 2 at 289). In fact, Bass was released from custody on probation within days after Fleming's first trial was concluded (Tr. 2 at 195). The recommendation for parole was made by the same Georgia district attorney who prosecuted Son Fleming and called Ira Bass to the witness stand (Tr. 2 at 202). The release was supported by the judge that presided at Son Fleming's trial (Tr. 2 at 202).

When factors affecting the credibility of government witnesses are withheld from the jury, the government violates the defendant's due process rights secured by the Fourteenth amendment to the United States Constitution. Napue v. Illinois, 360 U.S. 264 (1959), and Giglio v. United States, 405 U.S. 150 (1972).

The timing and circumstances of Bass's release--and subsequent disappearance --establish a clear presumption that his testimony at Fleming's trial was delivered in the expectation of favorable treatment by the government.*/ Since Georgia could not locate Bass to testify at Fleming's second (sentencing) trial (Tr. 2 at 217-218)--a convenient and highly suspicious disappearance--there had been no opportunity for the petitioner to question him regarding the particulars of his conversations with the government and subsequent anomalous probation. The defense should not, however, be penalized for the government's inability to produce its key witness, especially in the circumstances of a case like this.**/

Footnotes */ and **/ appear on following page.

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*/ The State of Georgia has argued that the early release of Bass, serving concurrent sentences for child molestation following earlier convictions and incarceration for armed robbery, was a routine probation decision that was unconnected with his testimony at Fleming's first trial. However, the Record from Fleming's second (sentencing) trial, following Bass's discharge from custody, demonstrates that Bass's release was anything but routine. On the witness stand, the probation officer charged with Bass's supervision following his release described his first contact with Bass:

> A. Well this was an unusual situation. We received Mr. Bass in our office on February 9. We did not have any prior notice that he was coming in.
> Q. How did he get to your office?
> A. He was sent to our office from the Adel Probation Parole Authorities.
> Q. Yeah, but how did he travel?
> A. I don't know, sir.
> Q. Did he just walk in your office?
> A. He appeared in our office--
> Q. He was not in the custody of any officer?
> A. No, sir.
> .....
> Q. But you do know that although it is the ordinary thing for you to be furnished with a record of the crimes that he's been committed of and the sentences that he's served heretofore, you were not furnished that in this case?
> A. We did not receive it immediately, no, sir, and I--
> Q. Have you ever received it?
> A. --I don't find it in his file, sir.
> .....
> Q. Do you remember how long he said he'd been out of the Cook County jail--when he first went to your place?
> A. No, sir. When he first came in he said that he had been put on parole in Adel and he had some paperwork from Adel. It was an unusual situation. I've never encountered it before and I called Atlanta to ascertain what the situation was. I was advised that this was not a common occurrence but that this sentence had been remitted to probation rather than being placed on parole. This does happen from time to time; however, I had never experienced it before.

Tr.2 at 207-208.

**/ Furthermore, it should not be necessary for the petitioner to prove that the government exchanged clear promises with its witness. In United States v. Butler, 567 F.2d 885 (9th Circuit, 1978), the court remanded for a new trial in spite of government testimony that no promises of leniency had been made. The opinion quoted the observation of the District Court:

> [w]e know from experience that the Government, the Government agents and counsel for the Government have ways of indicating to defendant's counsel that benefits are likely to result from cooperation. That can be indicated without making a bald promise that the charge is going to be reduced or that the case is going to be dismissed. Id., at 888.

Since Bass's testimony was the only evidence introduced by the government to show that Fleming participated in the actual killing of Sheriff Giddens, it was obviously crucial.

Either of the two constitutional infirmities cited above for Bass's testimony would warrant reversal of Fleming's guilty verdict. The only appropriate remedy is a new trial where Bass's testimony is barred altogether (in the event he is conveniently re-discovered) for its violation of Fleming's right to counsel, or only admitted with accompanying evidence of the arrangements the government made to secure Bass's cooperation.

VI. Petitioner's constitutional rights were violated by the statements of the prosecutor and the trial judge impeaching his exculpatory testimony by arguing that he had remained silent at arrest and arraignment.

Both the prosecutor and the trial judge violated the holding of this Court in Doyle v. Ohio, 426 U.S. 610 (1976). In discussing petitioner's claim that he did not shoot the policeman, but that the others did, and that he had tried to get the others not to kill him, the prosecutor made the following argument to the jury: "Even when he saw Willie Jones [the arresting officer] he could have said that. He didn't." (Args. of Counsel, at 40-41). In addition, the trial judge himself at the second sentencing trial, sought to impeach petitioner's testimony by informing the jury that petitioner had been silent at the arraignment (where he was unrepresented by counsel). In questioning petitioner about his claim that a confession had been beaten out of him, the judge asked the following rhetorical "question": "Why didn't you tell me about all this other though at that time when I was talking to you." (Tr 2 at 380)."That time" referred to the arraignment hearing at which petitioner was unrepresented by counsel. The prosecutor followed up on this in his closing argument to the jury: "They say he beat him [but] did he tell the Judge that? Did he tell anybody that?. . . He did not." The prosecutor also argued as follows:

> Well, what is the truth?...Oh, I begged them not to kill him... When did he make his first complaint to anyone?...If he was innocent and didn't actually want to take part in that murder... [H]e cannot be excused for not making an outcry when Deputy Sheriff Willie Jones commanded him to get out of that car that night. He did not make an outcry... (Emphasis supplied). (Tr. 2 at 425-27)*/

This Court has held that the use of a defendant's silence at arrest cannot be used to impeach his subsequent claim of innocence or his subsequent exculpatory explanation of the events at issue. Doyle, supra. Surely in a capital case, involving a defendant who was unrepresented during crucial stages of his case, the statements of the prosecutor and trial judge violated petitioner's rights. This important issue should be reviewed by this Court.

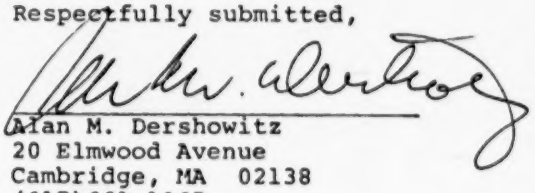
CONCLUSION

When this Court upheld the constitutionality of the death penalty, it imposed a series of sacred trusts and duties upon itself: to assure that no possibly innocent person is ever executed; to require "a greater degree of reliability" than in non-capital cases; to assure that only those most deserving the extreme penalty are executed; to assure that no person is executed whose pre-trial and sentencing procedures have not complied with the highest standards of constitutionality; to assure that no one is executed who did not personally commit a crime deserving of that unique and irrevocable penalty. This case--involving a poor, semi-literate, black man from rural Georgia--invokes those trust and duties. Son Fleming forcefully maintains his complete innocence of the killing of Chief Giddens. The trial judge has formally acknowledged that all doubts about his guilt have not been foreclosed. His co-defendant, whose involvement in the crime far exceeded that of petitioner, was sentenced to imprisonment. The defendant raises the most

*/ The prosecutor also listed other opportunities that petitioner allegedly had to make his "outcry" of innocence to others.

fundamental constitutional challenges to the processes by which he was convicted and sentenced to death as well as to the substance of those determinations. The proceedings which resulted in his death sentence were so fundamentally flawed by the sloppiness of the trial counsel and trial court that the verdict and sentence do not even contain the degree of reliability that should suffice for a sentence of imprisonment. Surely they do not satisfy the "greater degree of reliability" required in a capital case. Petitioner is entitled to review by this Court and reversal of his conviction and death sentence.

Respectfully submitted,



Alan M. Dershowitz
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APPENDIX

1. Exhibit A - Denial of Motion for Reconsideration by the Supreme Court of Georgia, dated Nov. 14, 1980.

2. Exhibit B - Denial of Application for a certificate of probable cause to appeal by the Supreme Court of Georgia, dated Oct. 21, 1980.

3. Exhibit C - Denial of Petition for a Writ of Habeas Corpus by the Superior Court of Tattnall County, Georgia, dated July 1, 1980.

4. Exhibit D - Fleming v. State, 243 Ga. 120 (1979).

5. Exhibit E - Fleming v. State, 241 Ga. 42 (1977).

6. Exhibit F - Ga. Code Ann. 27-2534.1.

7. Exhibit G - Report of the Trial Judge, Second Sentencing Trial, Dated Oct. 24, 1978.

8. Exhibit H - Trial Judge's Charge to the Jury, Second Sentencing Trial, Tr. 2 pp. 480-493.

9. Exhibit I - Title page from Transcript of Committal Hearing, dated May 14, 1976.

Applic. No. 1333 EXHIBIT A

RECEIVED NOV 21 1980

SUPREME COURT OF GEORGIA

ATLANTA, November 14, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

SON H. FLEMING V. SAM AUSTIN, WARDEN

Upon consideration of the Motion for Reconsideration filed in this application, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hartford, Deputy Clerk.

EXHIBIT B

Application No. 1333

RECEIVED OCT 27 1980

SUPREME COURT OF GEORGIA

ATLANTA, October 21, 1980

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

SON H. FLEMING V. SAM AUSTIN, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. All the Justices concur, except Hill, J., dissents.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

EXHIBIT C

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

SON H. FLEMING,	*	
	*	
Petitioner,	*	CIVIL ACTION NO. 80-41
	*	
v.	*	HABEAS CORPUS
	*	
SAMUEL W. AUSTIN, WARDEN,	*	(DEATH PENALTY CASE)
	*	
	*	
Respondent.	*	

ORDER OF THE COURT

The above-styled habeas corpus petition is the result of a death sentence which the Petitioner received for the murder of Ray City Police Chief James Giddens.[1/] Petitioner has had two trials on this charge, the first in the Superior Court of Lanier County in which a sentence of death was imposed, but was later reversed by the Supreme Court of Georgia due to a deficiency in the sentencing instruction during the penalty phase of the trial. Fleming v. State, 240 Ga. 142, 240 S.E.2d 828 (1977). Petitioner's trial for resentencing was removed from Lanier County to Cook County. Petitioner once again received a death sentence. This sentence was later upheld by the Supreme Court of Georgia. Fleming v. State, 243 Ga. 120, 252 S.E.2d 609 (1979), cert. den., ___U.S.___, 62 L.Ed.2d 115 (1979).

The first issue this Court will address is the request for a continuance which was filed by Petitioner's counsel on

1/ A stay of execution accompanied this petition for writ of habeas corpus, said stay having been granted by this Court on March 10, 1980.

Filed in Office
This 1st day of July 1980
Time: 3 P.
Susie W. Rowland
Clerk
Deputy

the morning of the hearing set for this matter, March 27, 1980. At that time this Court denied the request for a continuance. Petitioner argues that he was not allowed to present evidence because he was not prepared and needed the continuance. For reasons set forth Petitioner did not show an adequate basis upon which a continuance should have been granted. This was not the first time this matter was set for a hearing, as there was an earlier petition, No. 79-146 which was dismissed without prejudice by another attorney who then represented the Petitioner. The first petition was dismissed on March 1, 1980. This Court notes that the stay granted under petition No. 79-146 was dated December 4, 1979, with the Court at that time setting the matter down for a hearing on January 25, 1980. The January, 1980 hearing was continued at Respondent's request due to a schedule conflict. The Petitioner did not contest the continuance at that time. The reason the first petition was dismissed was because the attorney who had represented the Petitioner pro bono accepted employment outside the State of Georgia, and was not able to meet the rescheduled hearing date. A new execution date following the dismissal of the first petition was set by the trial court for March 14, 1980.

Petitioner's new attorney who is presently representing him is not a member of the State Bar of Georgia, but proceeds with this Court's approval following her filing a petition to proceed pro hac vice. It appears to this Court that this attorney accepted this case at a time when she was already experiencing a heavy work load. Nevertheless, approximately two weeks elapsed from the time that the stay was granted by this Court until the hearing date. The request made upon this Court on the morning of March 27, 1980, for a continuance was an unreasonable request, in that Petitioner's counsel requested a three month continuance. Contrary to the Petitioner's contentions at the time

this Court denied the request for a continuance the Court, was fully aware of the Petitioner's right to have a full and fair state evidentiary proceeding. Townsend v. Sain, 372 U.S. 293 (1963). This Court finds that the Petitioner was not denied his right to a full and fair state evidentiary hearing, particularly based upon the documentary evidence presented to the Court during that hearing on the issues raised in the petition and amended petition for habeas corpus. Specifically, this Court finds that counsel for Petitioner made no offer of proof that any witnesses whom she may have desired to subpoena would have been unable to come to the hearing on March 27, 1980, but would have been able to come at a later date. There was no showing whatsoever by Petitioner's counsel that she had contacted any witnesses and as such, the request for a continuance was unsupported by any good faith effort, even though local counsel in this matter had been secured, that being an attorney from Savannah, Georgia. While Petitioner's counsel is not a member of the State Bar of Georgia, nor does she reside in the State of Georgia, there was no showing whatsoever that co-counsel could not have proceeded with the contacting of any witnesses whom the Petitioner might have wished to have present at the hearing. More importantly, this Court specifically finds that based upon the material contained in the trial transcripts of the proceedings in Lanier and Cook Counties that additional testimony from witnesses would not have altered the findings of fact and conclusions of law which this Court will make later on in this order.

Next, this Court finds that in the request seeking a three month continuance the Petitioner had asked this Court in connection with this request for funds with which to pay certain experts on the issues of the impact of pretrial media coverage as well as to explore the possibility that there may have been some infirmity in the composition of the grand and petit jury pools.[2/] Petitioner's

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2/ This specific issue will be dealt with separately in the later portion of this order.

attorney made absolutely no showing whatsoever that any infirmity existed in any of the areas sought to be explored through the appointment of experts and funds to support those experts. In short, Petitioner sought a continuance not founded on fact, but upon speculation in hopes that evidence in support of a general hunch could be supported. This Court concludes that this is not a sound nor is it a legally sufficient basis for the granting of a continuance in this case. The fact that the Petitioner is under a death sentence does not set forth a different constitutional standard in determining whether a motion for a continuance should be granted.

This Court further finds that the denial of Petitioner's request for a continuance was proper, in that the fifty-two issues raised in the petition and amended petition can be answered by examining the trial transcripts in both the Superior Courts of Lanier and Cook Counties and the records and other documentary evidence which was introduced at the hearing on March 27, 1980. These documents have convinced this Court that the issues raised by the Petitioner can be resolved from examining the contents of these documents, or as a matter of law can be decided without the necessity of a further evidentiary hearing, or for that matter, without having the matter continued.[3/]

It is also the finding of this Court that the Petitioner's attorney in this habeas corpus proceeding had an excellent knowledge

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3/ A specific finding on each of the issues contained in the petition and amended petition will follow the discussion concerning the denial of the motion for a continuance.

of the issues which were raised in both the petition and amended petition, this Court basing its finding upon the lengthy discussion with which said counsel went through each of the issues contained in the petition and amended petition. As noted earlier, this Court has found that the issues contained in the petition for writ of habeas corpus and its amendment can be addressed by examining the documentary evidence introduced at that hearing. Consequently, for these reasons this Court finds that its initial pronouncement to deny the continuance is amply supported by the findings which the Court now enters concerning the denial of the motion for a continuance.

This Court has since the hearing on March 27, 1980, had a sufficient opportunity to examine the voluminous documents which were introduced at that hearing, documents which include the trial transcripts of the proceedings held in the Superior Courts of Lanier and Cook Counties. Based upon that examination, this Court enters the following Findings of Fact and Conclusions of Law:

VOLUNTARINESS OF INCRIMINATORY STATEMENTS MADE BY PETITIONER FOLLOWING HIS ARREST

Petitioner has alleged in his habeas corpus complaint that he did not make a knowing, intelligent and voluntary waiver of his right to appointed counsel at the time of his arrest, and subsequently his later statements to the police were not made with a knowing and intelligent waiver of his right to have counsel present before making such incriminatory statements. Petitioner also argues that he suffers from a serious speech impediment, and that he was not mentally competent at the time of his arrest or at the time of his trial. It is the finding of this Court that at the hearing on March 27, 1980, Petitioner offered no evidence in support of his contention that

he was "effectively illiterate," or that he was mentally incompetent. This Court has examined Respondent's Exhibit No. 7 which is the transcript of the first trial which occurred in Lanier County in January of 1977. From this Court's examination of this exhibit the Court finds that the trial court's inquiry into the voluntariness of a statement made by the Petitioner is supported by the evidence which resulted from a hearing conducted in accordance with the United States Supreme Court's decision in Jackson v. Denno, 378 U.S. 366 (1964). Specifically, this Court finds that at pages 315-356 and at pages 410-442 in Respondent's Exhibit No. 7, the State has clearly established the voluntariness of the waiver of counsel and the ensuing incriminatory statements made by the Petitioner. The Court further finds that even though the State was not required at the resentencing procedure in Cook County to go into the voluntariness of the statements, the matter having been determined at the first trial, the trial court nevertheless directed the state to hold another inquiry into the voluntariness of the Petitioner's statements. This material was contained in Respondent's Exhibit No. 2 at pages 230-248. It is therefore the conclusion of this Court that the evidence presented at both these hearings supports the trial court's finding of voluntariness by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972); High v. State, 233 Ga. 153 (1974).

This Court further notes that the voluntariness of Petitioner's statements were not challenged at trial, although counsel for Petitioner did file a motion to quash those statements. See, Record at pages 30-32. This Court having found that the voluntariness of the various statements rendered by the Petitioner is supported by a prepondernance of the evidence will not at this time relitigate the voluntariness of these statements, particularly in the absence of there being a showing of actual prejudice. See, Wainwright v. Sykes, 433 U.S. 72 (1977).

ALLEGED JURY PREJUDICE IN IMPOSING DEATH SENTENCE

This Court finds that the contention that the juries which imposed the Petitioner's death sentence acted under the influence of passion, prejudice or any other arbitrary factor is without merit. Specifically, this Court finds that the jurors who tried the Petitioner in both cases had not formed any preconceived notions as to the guilt or innocence of the Petitioner. This Court specifically bases this finding of fact upon its examination of the voir dire proceedings in both the Superior Courts of Lanier and Cook Counties. Moreover, this Court finds that the Supreme Court of Georgia in reviewing the imposition of the death penalty in this case specifically found that the sentence of death in this case had not been imposed under the influence of passion, prejudice or any other arbitrary factor. Fleming v. State, 243 Ga. at 123. More specifically, this Court by way of an appendix to this opinion, which is adopted and made a part of this Court's Order and Findings of Fact and Conclusions of Law establishes that an impartial jury was assembled in both the Superior Courts of Cook and Lanier Counties.

Also without merit is the Petitioner's claim that when he was retried following the setting aside of his first death sentence that the same jury which determined his guilt or innocence should have been the jury which resentenced him. The Supreme Court of Georgia has settled this question adversely to the Petitioner, Fleming v. State, 243 Ga. 120 (1979), and consequently, this Court will not in the absence of any intervening law change its decision by ruling to the contary. See, Phillips v. Hopper, 237 Ga. 68 (1976).

The Petitioner also contends that the imposition of the death penalty in his case was unconstitutional because the death penalty statute in Georgia does not specifically delineate mitigating circumstances. Petitioner also argues that the death penalty

statute is unconstitutional as it allows prior convictions to be used for aggravation, and because the aggravating circumstances are not contained in the indictment, and that the death penalty is applied arbitrarily and capriciously by geographic locations. Petitioner also argues that the manner in which the death sentence is actually carried out is unconstitutional, and that the death penalty has been rejected by contemporary standards of decency and dignity by society. This Court finds that all of these contentions are unmeritorious. Specifically, the Supreme Court of Georgia has said in numerous opinions that it is not required that the specific mitigating circumstances be singled out by the court when it gives its sentencing instructions. Collier v. State, 244 Ga. 553, 569 (1979); Potts v. State, 241 Ga. 67 (1978). Mitigating circumstances should be anything that the jurors so desire to consider as mitigating circumstances, and to specifically place in a statute those things which would constitute mitigating circumstances would more than likely meet with constitutional problems in view of Green v. Georgia, ___U.S.___, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) and Lockett v. Ohio, 438U.S.586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Our Supreme Court has also held that aggravating circumstances need not be alleged in the indictment. Goodwin v. Hopper, 243 Ga. 193 (1979). Also without merit is the Petitioner's argument that the death penalty is unconstitutional because it permits consideration of prior convictions as aggravating circumstances. This argument has absolutely no merit to these proceedings since this aggravating circumstance was not sought by the State, nor was it found by the jury. This Court further finds that there is no merit to the contention that the death penalty is administered and applied in an arbitrary and capricious fashion. Specifically, this Court finds that no evidence was presented on any of these matters. While the Petitioner did request a continuance, a matter which has been addressed earlier, this Court finds that there was no offer of

proof made whatsoever to establish that the death penalty is imposed arbitrarily because of geographic locations. Lastly, the Petitioner's argument that the death penalty is cruel and unusual punishment or is against the contemporary standards of decency in the United States was rejected in Gregg v. Georgia, 428 U.S. 153 (1976).

Also without any basis whatsoever is the Petitioner's allegation that the jury which sentenced him to death did not believe that the Petitioner would in fact be executed. This amounts to nothing more than speculation on the Petitioner's part. Perhaps at best, this is wishful thinking, but wishful thinking is not a basis upon which to allege that there has been a constitutional deprivation. The Petitioner's earlier attempts to secure a continuance so that evidence could be gathered on this matter establishes the weak basis upon which the motion for a continuance was requested, since the Petitioner obviously sought to use this continuance as a expedition to see if evidence could be supported to back up this assertion. There was no offer of proof, nor has there been any showing by the Petitioner that his theory has any basis in this case, or that any continuance would establish evidence in support of this contention. Neither has Petitioner established that this theory has been recognized by the courts.

Also without merit is the allegation that the trial judge failed to adequately charge the existence and consideration of mitigating circumstances as against the aggravating circumstances which the State needed to prove beyond a reasonable doubt. This specific contention was the basis upon which the Supreme Court of Georgia first set aside Petitioner's death sentence in 1977. Fleming v. State, 240 Ga. at p. 146. In reviewing the retrial for sentencing which again imposed the death sentence, the Supreme Court of Georgia found the trial judge had properly complied with its earlier holding in Petitioner's first trial, as well as finding that the trial court had specifically addressed the issue as to

mitigation. Hawes v. State, 239 Ga. 630 (1977).

This Court also finds that there is no merit to the allegation that the trial judge improperly filled out his report or that the report which is to be filed after a death sentence is imposed is unconstitutionally inadequate. Once again, no evidence was presented, nor did the Petitioner point out where the report was deficient. Certainly, a continuance was not needed to point out any alleged deficiencies or unconstitutional aspect of the trial judge's report.

This Court further finds that there is no merit in the contention that the Georgia Death Penalty Statute denies one the right of effective assistance of counsel since the statute does not provide an indigent with sufficient resources to develop a defense. Once again, no evidence was presented, nor was a continuance needed to make this contention develop in a different manner. This matter is resolved as a question of law, and a matter which is resolved adversely to the Petitioner by this Court. See Gregg v. United States, supra.

WITHERSPOON CONTENTIONS

Petitioner contends that during the jury selection process in both trials potential jurors were improperly struck for cause even though they were "unalterably opposed" to the death penalty, and would not impose it regardless of the evidence presented during the trial. In Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court of the United States held that potential jurors who expressed a view which renders them unalterably opposed to the death penalty regardless of the evidence presented is a proper basis for striking those potential jurors for cause. See also, Lockett v. Ohio, supra. In Witherspoon, supra, the Supreme Court of the United States held that merely because one had a religious scruple against the death penalty would not be a basis for striking him, but if that individual would not vote to uphold the death penalty regardless of the evidence presented because of his views on the death penalty, then that individual could properly be stricken, because the individual in that case would not be considering a punishment in terms of the evidence presented. That is, the individual had already prejudged a sentence regardless of the evidence presented in the case. An examination of Respondent's Exhibits 2 and 7 fails to establish that any potential jurors were improperly excused under the Witherspoon standard. Finney v. State, 242 Ga. 580 (1978); Douthit v. State, 239 Ga. 8 (1977); Corn v. Hopper, 244 Ga. 28 (1979). In the Cook County trial in 1977, ten potential jurors were challenged for cause and excused because they would vote against the imposition of the death penalty regardless of the evidence. These potential jurors were Sharon T. Flythe (T. 5-6) (all references refer to Respondent's Exhibit No. 7); Joe Holmes (T. 608); Ms. Lucious Hill (T. 10-11); Robert Pitts (T. 17-18); Johnnie Mae Jenkins (T. 18-19); Mary Suggs (T. 19-20); Theodis Williams (T. 20); Charles Mae McCormick (T. 28); and, Alva Head (T. 35-36).

In the original trial in 1977, in Lanier County, the following individuals were challenged for cause in accordance with the guidelines set down in Witherspoon, supra: Sylvia O. Quinn (T. 9); Ms. Foster (T. 10); Louvenia Williams (T. 10-11); John H. Sanders (T. 61); Nell Foster (T. 61); Deloris Woodward (T. 62); and, an unnamed juror (T. 108). Petitioner's allegation concerning Witherspoon violations is totally unsupported by the evidence before this Court.

JURY COMPOSITION

Petitioner attacks not only the composition of the grand and traverse juries, but the method by which jurors were picked for jury service. As noted in an earlier discussion of this order, Petitioner had requested a continuance so that research could be done into determining whether the manner in which the juries were selected contained any constitutional deficiencies. As noted earlier, this Court found that without any offer of proof, or that other evidence existed which would tend to indicated that this claim could be substantiated, a continuance was not in order. This Court further finds that the Petitioner's contention that young people, specifically that individuals eighteen through thirty were left off both the grand and traverse jury lists fails to state a claim, since this is not a recognized class for the purposes of jury composition. Hudson v. State, 240 Ga. 70 (1977). Petitioner also challenges the provision of Georgia law which allows women to apply for a special exemption if they have children under the age of fourteen. See, Ga. Code Ann. § 50-112(b). Petitioner says this violates Duren v. Missouri, 439 U.S. 357 (1979). In Willis v. State, 243 Ga. 185, 188(3) (1979), our Supreme Court held: "We hold that the Georgia statute authorizing the trial judge to excuse the juror who is a housewife

with children fourteen years of age or under does not violate the Sixth and Fourteenth Amendments to the United States Constitution." Id.

Petitioner in arguing his jury composition allegations says his attorney was ineffective because he did not challenge the composition of the grand jury. Under Georgia law a challenge to the grand jury composition must be made prior to indictment, and any later challenge would not have been timely. Young v. State, 239 Ga. 295 (1974); Goodwin v. Hopper, 243 Ga. 193 (1979). Additionally, there must be a showing of actual prejudice resulting from the jury's not having been challenged, as well as cause for there not being a challenge. Absent such a showing counsel cannot be said to have been ineffective. Francis v. Henderson, 425 U.S. 536 (1976); Steward v. Ricketts, 451 F.Supp. 911 (M.D. Ga. 1978); Spencer v. Hopper, 243 Ga. 532 (1979).

The classes of people which the Petitioner contends were left out in both the grand and petit juries, such as poor people and teachers in addition to those between the ages of eighteen and thirty does not establish a recognizable class of individuals for the purposes of challenging jury composition. Cobb v. State, 244 Ga. 344 (1979).

Petitioner has also made a conclusory allegation that the prosecutor had a role in picking the grand jury which indicted the Petitioner. Here there has been no evidence to support this allegation. Also without merit is the contention that the district attorney exercised his peremptory challenges in striking blacks and women. It is well recognized that an accused has no right to a jury composed of a particular race, nor is it improper for a district attorney to use peremptory challenges to strike on the basis of race or sex. Swain v. Alabama, 380 U.S. 202 (1965); Jordan v. State, 235 Ga. 732 (1975).

DISTRICT ATTORNEY'S CLOSING ARGUMENTS AND CONDUCT DURING BOTH TRIALS IN GENERAL.

Petitioner makes several allegations concerning the alleged prejudicial arguments made by the district attorney in both the Lanier and Cook Counties' trials. These contentions are unfounded. This Court finds that references to previous brushes with the law which the Petitioner had were brought out on cross-examination by the Petitioner's counsel during the examination of State's witness Terry Coney. See, Respondent's Exhibit No. 2, page 79. On redirect, questions were asked of witness Coney concerning the questions brought out on cross-examination, since the Petitioner's lawyer had opened the door to those questions. Respondent's Exhibit No. 2 at page 81. Further evidence as to the Petitioner's character was brought out again in recross-examination by the Petitioner's lawyer. Respondent's Exhibit No. 2 at pages 83-84.

During the district attorney's closing arguments references to witness Coney's testimony on cross-examination by the Petitioner's lawyer appears on page 421 in Respondent's Exhibit No. 2. Sub judice, where defense counsel elicits the complained of testimony on cross-examination he cannot later complain. Lemon v. State, 235 Ga. 74(2) (1975); Lunsford v. State, 145 Ga. App. 446 (1978); Huff v. State, 144 Ga. App. 764 (1978). Consequently, this Court may find that the references to prior scrapes with the law which the Petitioner had were brought out on cross-examination by the Petitioner's counsel, and not by the State, and as such, the Petitioner cannot now complain. Again on cross-examination Petitioner's counsel brought out his character regarding previous arrests, and the supposed taking of money from a cab driver.

Respondent's Exhibit No. 2 at page 348. See, Shepherd v. State, 239 Ga. 28 (1977). Moreover, the fact that this was referenced in oral argument by the State's attorney does not provide a basis for habeas corpus relief, particularly since there was no objection. Reid v. State, 137 Ga. App. 495 (1976).

Petitioner's references of the district attorney commenting upon the injury to the Petitioner's jaw as alleged veiled references that the Petitioner was on welfare, and supposed comments on the failure of the Petitioner to call his fellow accused is unsubstantiated by the trial transcripts. See Smith v. State, 245 Ga. 205, 207(4) 1980.

Petitioner also states that the prosecutor improperly used as an aggravating circumstance during his argument reference to a taxi driver's accusation of robbery by the Petitioner which did not result in a formal charge. See page 421 of Respondent's Exhibit No. 2. This, again refers to testimony which was brought out through cross-examination by the Petitioner's attorney, as is the reference to a sheriff's statement that the Petitioner had been involved in fighting and drinking. The same goes for the reference to co-defendant Willis. A prosecutor is permitted to draw deductions from the evidence, and these deductions may be illogical, unreasonable or even absurd. Owens v. State, 120 Ga. 209 (1904). The prosecutor's inference that the Petitioner had driven the get-away-car during the robbery which occurred before the murder is a reasonable inference which can be gleaned from the evidence. While the district attorney's argument may have been strong, it was in line with the evidence presented throughout the trial.

It is also important to note that the Supreme Court of Georgia when it reviewed the Petitioner's second proceeding

on sentencing specifically stated, "We find no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." Fleming v. State, 243 Ga. supra at 123. Petitioner further states that in the closing argument by the district attorney that there are improper references concerning the fact that the death penalty is a deterrent to crime when there are no facts to support it! Petitioner further argues that improper argument occurred when the district attorney said that a State's witness had disappeared because he had testified against the Petitioner, but no evidence to support this fact was introduced at trial. These allegations are also unmeritorious. At page 444 in Respondent's Exhibit No. 2, which is the resentencing proceeding in the Superior Court of Cook County, this Court finds that it is not improper or unreasonable for a prosecutor to argue that the death penalty is a deterrent to crime. Furthermore, this is merely the statement of the prosecutor, which is not evidence, since the jury was later charged as to what circumstances they must find beyond a reasonable doubt before they could impose the death penalty.

Neither does this Court find based upon its examination of page 442 of Respondent's Exhibit No. 2, that the district attorney stated that State's witness Ira Bass was not at trial. The inference that he may have disappeared because he had first testified is not an unreasonable inference which can be taken from the evidence. Furthermore, there was no objection to the district attorney's argument in this regard. This amounts to a waiver. See Reid v. State, 137 Ga. App. 495 (1976).

Petitioner states that his right to confrontation was denied because of the prosecutor's references to facts not in evidence or facts which were contrary to the evidence. As noted in an earlier discussion, most of the district attorney's argument was unobjected to and therefore any objections were waived.

Furthermore, the prosecutor's arguments contained reasonable inferences that could be drawn from the evidence in the record.

The Petitioner also alleges that the use at the second trial of the prior testimony of witness Bass denied him his right of confrontation. This matter was addressed by the Supreme Court of Georgia in headnote 6 concerning the Petitioner's trial for resentencing. 243 Ga. 120, 123.

Next, Petitioner argues that the prosecutor during the resentencing proceeding in Cook County improperly stated that an aggravating circumstance was the fact that the police chief left behind a widow and small children. As noted earlier the Georgia Supreme Court when it reviewed the new trial for sentencing purposes in Cook County found that the imposition of the death penalty was not imposed under passion, prejudice or any other arbitrary factor. Fleming v. State, 243 Ga. supra. Moreover, a district attorney's argument is not the law, but merely his version of the evidence, and it was not an unreasonable inference or deduction that because the victim left behind a wife and two small children that this would establish the heartless and senseless killing of the victim by the Petitioner and his cohorts. See, Respondent's Exhibit No. 2 at pages 419 and 421. References to the wife and the children are reasonable inferences which can be drawn from the evidence. Furthermore, at page 420 in Respondent's Exhibit No. 2 the district attorney specifically said, "You'll not have this one as one of the statutory aggravating circumstances, but the State is entitled to show you, to argue to you how violent, how horrible, this crime was when they may leave a mother helpless and a widow and leave three children, small children all of them." It should also be noted that the Petitioner argues that the district attorney said that the children were made orphans, and

yet there is no reference to this whatsoever in the prosecutor's argument. This assertion of prejudicial argument and the delineation of an aggravating circumstance not provided for in the statute is totally unfounded. See Respondent's Exhibit No. 2 at p. 485.

CONDUCT OF TRIAL JUDGE

Petitioner has alleged that during his retrial for sentencing in Cook County the trial judge acted improperly when he asked the Petitioner certain questions concerning his earlier testimony that he had been physically abused by law enforcement officers. Petitioner says this violated his Fifth Amendment right to remain silent. Petitioner's contention is a reference to the United States Supreme Court holding in Doyle v. Ohio, 426 U.S. 610 (1976). In Doyle the Supreme Court held that the prosecutor improperly cross-examined the defendants about their failure to tell a story that they had been framed when they were arrested. Sub judice, the trial judge at the resentencing trial on pages 379 through 380 asked the Petitioner a question or two as to why he had not, several months prior to arraignment, mentioned that he had been allegedly beaten by law enforcement officers. This type of questioning is far different from that which appears in Doyle, since in this case the question of guilt or innocence of the Petitioner had already been determined. In Doyle the prosecutor's cross-examination of the defendants occurred during the guilt or innocence phase of the trial, and substantially effected their right to remain silent following their arrest, and their right to talk with an attorney before they made any divulgences of the fact that they had allegedly been framed. In Doyle post-arrest silence was used to impeach, and in this instance the Court's questions to the Petitioner were not designed to impeach the Petitioner. See, Hall v. State, 241 Ga. 252 (1978). This Court finds this contention to be without merit.

Next, the Petitioner argues that because the trial judge after the first trial placed State's witness Ira Bass on probation that he should have excused himself from presiding over the second trial which dealt solely with punishment. Petitioner argues that the judge's action in probating Bass' sentence is evidence of his bias towards the Petitioner. All of this has been totally unsubstantiated by the Petitioner. Petitioner has failed to point to any conduct on the trial judge's part that would even hint of a bias towards him.

VOIR DIRE

Petitioner argues that the failure of the trial judge to conduct an individual sequestered voir dire, that is where each potential juror was questioned outside the presence of the others, violates his constitutional rights. There was an individual examination of each juror as provided for in Ga. Code Ann. § 59-705. The matter of whether to have a sequestered individual voir dire rests within the discretion of the trial judge, and there is nothing in this case to show the trial judge abused his discretion, or that a request for an individual sequestered voir dire was made. Finney v. State, 242 Ga. 580, 582 (1978).

EVIDENTIARY CONTENTIONS

There is an allegation that the admissibility into evidence of two pistols, some wet clothing, a paper sack and a cup were improperly placed into evidence because they were the result of an unlawful search and seizure. In this case they followed the execution of a consent form. The testimony concerning the execution of this consent form appears on pages 278 through 280 in Respondent's Exhibit No. 7, which is the transcript of the first trial. That testimony establishes that Petitioner fully and readily gave his consent to that search. (T. 280). No objection was made as to the voluntariness of this procedure, nor was there any objection to the admissibility of the above-referenced matters. The absence of any objection at the time the evidence is admitted bars the right to raise and present such an issue in a collateral proceeding. Estelle v. Williams, 425 U.S. 501 (1976); St. John v. Estelle, 544 F.2d 894 (5th Cir. 1977), aff'd. 563 F.2d 168 (1977). Moveover, even if the officers had not obtained a written consent from the Petitioner, the search would have been permissible as being incident to an arrest in a motor vehicle. See, Carroll v. United States, 267 U.S. 132 (1925). Chambers v. Marooney, 399 U.S. 42 (1970).

Next, it is alleged that the prosecution improperly bolstered the credibility of one of its own witnesses, that being witness Ira Bass. This is alleged to have occurred at the first trial. Again, there was no objection to this testimony, and the failure to make a timely objection as to its admissibility forecloses habeas review. See, Wainwright v. Sykes, 433 U.S. 72 (1977).

There is also an allegation that the Petitioner was unable to properly cross-examine and confront certain experts who testified on behalf of the State in the areas of ballistics and pathology because he was indigent. For the same reasons as mentioned in the discussion above this contention is unmeritorious. See, Spencer v. Hopper, 243 Ga. 532 (1979). See also, Pulliam v. Balkcom, 245 Ga. 99, 100 (1980).

INSTRUCTIONAL ISSUES

Petitioner states that his constitutional rights were violated in his trial for sentencing in Cook County because of the trial court's charge on credibility in general, as well as credibility and impeachment of witnesses. This Court finds that there was no objection to this instruction. Before a court will grant habeas corpus relief on an unobjected to instruction, the error must be so egregious so as to rise to the level of constitutional violation, or be so prejudicial that it rendered the trial fundamentally unfair.

> It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. Henderson v. Kibbee, 431 U.S. 145 (1977).
>
> The sentencing court's charge on credibility taken as a whole is a correct statement of the law concerning credibility. See, Braxton v. State, 240 Ga. 10, 12 (1977).

Petitioner also alleges that this instruction is improper because the jurors were not instructed on the difference between felony offenses involving moral turpitude and misdemeanor offenses, or in summary the instruction did not include sufficient definitive words. As a general rule, the failure to request a more complete charge when the charge in itself is adequate fails to state a cause for relief. Jackson v. State, 239 Ga. 40 (1977). I find the trial court's instruction to be a correct statement of the law which is not subject to a collateral attack because of the failure to give an additional definition within the charge. See, Talbott v. State, 148 Ga. 171, 173 (1978).

Neither do I find any merit concerning the instruction on credibility as being in error because it tended to as Petitioner states, "had the effect of instructing the jury that it had a positive duty to disregard Petitioner's testimony in its entirety if it found that he had been 'impeached.'" This charge is taken from Ga. Code Ann. § 38-1806. It has previously been upheld by the appellate courts in our State. Jeffers v. State, 145 Ga. 74, 77(1) (1916); Henderson v. State, 146 Ga. App. 114, 115(2) (1978). This particular charge appears on page 483 of Respondent's Exhibit No. 2. Petitioner also alleges that the trial court should have given an explanation of the word "impeachment." For the reasons stated earlier, a failure to request a more complete instruction or to provide a definition for a particular word will not serve as a basis to set aside a conviction. Spear v. State, 230 Ga. 74 (1973). In summary, the court's instruction on credibility when taken as a whole is not so harmful so as to constitute a denial of the Petitioner's constitutional rights. See, Jackson v. State, 239 Ga. 44 (1977).

Next is the argument by the Petitioner that at the Cook County trial the court failed to charge the jury on the elements of kidnapping with bodily injury in connection with the second aggravating circumstance, to wit: "The offense of murder was committed while the defendant was engaged in the commission of another capital felony, to wit: kidnapping of and bodily injury to James Edward Gidden, a human being." A review of the record in the new sentencing trial fails to show that any requests for a definition of kidnapping with bodily injury were requested, or that the jurors did not understand the meaning of the words kidnapping with bodily injury. See, Goodwin v. Hopper, 243 Ga. 193, 196(4) (1979).

DISCOVERY ALLEGATIONS

In various counts of the petition it is alleged that several items of a supposed exculpatory nature were withheld from Petitioner. Petitioner for example alleges that there was a deal with the district attorney between witness Ira Bass and the State concerning agreements which the State had made with Mr. Bass in return for his testimony. During the testimony of witness Ira Bass it was brought out by the State that the only agreement made between the State and witness Bass in return for his testimony was that witness Bass would not have to go back to Georgia State Prison following his court appearance in this case. See, Respondent's Exhibit No. 7, at pages 289, 291. During the hearing on March 27, 1980, Petitioner's attorney argued that after Ira Bass testified his sentence was reduced to a period of probation. This the Petitioner's attorney suggests shows that the complete terms of the agreement for Bass' testimony were not given to the jury so that they could properly assess this individual's credibility, and that as such this violates the Supreme Court's holdings in Giglio v. United States, 405 U.S. 150 (1972). The only assertion that there is any deal beyond that which appears in the trial transcripts is a naked assertion from Petitioner's counsel. Petitioner's counsel could have obtained a certified copy of any adjusted sentence, if any existed, and filed it as an exhibit with the Court. Counsel for Petitioner failed to so do, and in light of the evidence presented in the trial transcripts this contention is unfounded. In Fleming v. State, 236 Ga. 434 (1976), the Supreme Court of Georgia held that there was no evidence of any agreement in return for testimony even though subsequent disposition of charges pending against certain State witnesses took place after the trial. Sub judice, there is no evidence of any agreement other than that which appears in the trial transcript.

Petitioner states that the district attorney failed to disclose and provide him with copies of the statements taken from his co-defendants. Initially, there has been no showing that such statements existed. Furthermore, there is nothing showing that these statements contain exculpatory material. The mere fact that there are witness statements in a prosecutor's file does not mean that they are discoverable unless they contain exculpatory material. Spain v. State, 243 Ga. 15 (1979); Chambliss v. State, 149 Ga. App. 659 (1979). The State does not have to do a defendant's discovery for him. Rini v. State, 236 Ga. 715, 718 (1976).

Petitioner also argues that the State failed to make available the results of any paraffin tests which it may have made of the Petitioner concerning the firing of the murder weapon. Petitioner further argues that the State did not identify the name of a woman dispatcher who had earlier been talking with the victim, as well as not providing a copy of the dispatcher's log. The mere possibility that favorable evidence might exist which could affect the jury's verdict does not establish materiality in the constitutional sense. United States v. Agurs, 427 U.S. 97 (1976). In Moore v. Illinois, 408 U.S. 786, 795 (1972), the Supreme Court held that there is, "[N]o constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." Id. In this matter there is no showing that any paraffin tests were run, and the fact that there may have been one does not indicate that exculpatory evidence has been withheld. The same goes for the contentions surrounding the identity of a female dispatcher and the fact that the State did not produce at trial the complete dispatcher's log. The Petitioner has not made any showing that any of these matters contain exculpatory evidence. The burden rests with the Petitioner to show that

beneficial evidence was withheld denying him a fair trial. Dickey v. State, 240 Ga. 634 (1978). This he has failed to carry.

There is also the contention that the district attorney failed to send or provide a copy of Petitioner's confession to his attorneys and that this constitutes a suppression of exculpatory material. There is no constitutional requirement that in the absence of a request for a statement made by an accused that the prosecutor turn it over sua sponte, particularly if it does not contain exculpatory material. Clearly, by the nature of a confession its substance is incriminatory versus exculpatory. While Federal Rule 16, Federal Rules of Criminal Procedure requires a federal prosecutor to turn over any statements made by a defendant, such is not the case in state practice. The record at pages 30 through 31 shows counsel for Petitioner was aware of the confession. See also, Hearing Transcript of January, 1977, pages 19 through 20.

COMMITTAL HEARING

Petitioner argues to this Count that a committal hearing was conducted without the benefit of counsel to assist the Petitioner, this being in violation of Coleman v. Alabama, 399 U.S. 1 (1970). In Coleman, supra, the United States Supreme Court said that failure to provide counsel at a preliminary hearing unconstitutionally denies a defendant the assistance of counsel, but also stated that the case should be remanded for a determination as to whether the denial of the right of counsel was harmless or prejudicial error. Id. In this case, the question as to whether there was a preliminary hearing is a matter which is not entirely clear from the proceedings. At page 314 in Respondent's Exhibit No. 7, which is the transcript of the first proceeding in the Superior Court of Lanier County, the district attorney makes reference to a committal hearing by stating that at that time he gave a copy of the Petitioner's statements to the Petitioner's counsel. Appointed attorney Edward Parrish stated that he was not present at a committal hearing, since his client had not demanded it and he did not see any need to be there, although he was in and out of the proceedings at different times. (T. 314, 333). The district attorney says that such a hearing was held on May 14, 1976 (T. 332). If there was such a hearing then it was apparently a joint committal hearing involving all three co-defendants. (T. 332). While Mr. Parrish may have been present at the committal hearing in May of 1976, as he stated on page 222 in Respondent's Exhibit No. 7, the record indicates that he was not appointed until August 24, 1976. (R. 18). Another attorney by the name of Reece Franklin was appointed to represent the Petitioner on August 12, 1976. (R. 14).

The trial judge's report shows that counsel was appointed to represent the Petitioner in March of 1976 and again in August of 1976.

The Supreme Court of Georgia in the case of State v. Houston, 234 Ga. 721 (1975), recognized that a preliminary hearing was a "critical stage" in the prosecutorial process in Georgia similar to that which was found to exist in the Alabama proceedings referenced in Coleman v. Alabama, supra. However, in State v. Houston, the Supreme Court of Georgia said the fact that counsel was not present at a preliminary hearing does not equate with the holding of prejudicial or harmful error, and unless it can be shown that the lack of counsel at the hearing contributed to the conviction it will be deemed to be harmless error. State v. Hightower, 236 Ga. 58 (1976); Tarpkin v. State, 236 Ga. 67 (1976). Assuming arguendo that a preliminary hearing was held on May 14, 1976, this Court finds based upon the material contained in the trial judge's report, that an attorney had been appointed to represent the Petitioner in March of 1976, and as such it could be assumed that the attorney was present at the preliminary hearing. Furthermore, even if the other assumption is made that there was no counsel present, there has been no showing whatsoever that the lack of counsel contributed to the Petitioner's conviction. There has been no showing that at the preliminary hearing, if one existed, that the Petitioner gave any statement which was later used against him at trial, or that any favorable evidence was brought forth. In short, even if this Court were to find that there was a preliminary hearing and there was no counsel present, the Petitioner has not shown that the lack of counsel might have contributed to his conviction as he has not pointed to any specific matter which occurred during that preliminary hearing which would have altered the outcome of his trial.

FUNDS FOR EXPERTS

Petitioner says that it is a violation of his constitutional rights because the State does not provide him counsel, the funds to subpoena witnesses and to pay for experts and other investigators in a habeas corpus proceeding. It is well settled that habeas corpus is a civil proceeding, and the right to counsel appointed by the court is not applicable. Moye v. Hopper, 234 Ga. 230 (1975); Abraham v. Wainwright, 407 F.2d 826 (5th Cir. 1969). The fact that the nature of the penalty in this case involves a sentence of death by electrocution does not in and of itself require the appointment of counsel or the State to provide counsel and costs. See, Graham v. State, 372 S.E.2d 1363 (1979). Neither in a habeas corpus proceeding is the State under any right to subpoena those witnesses. Krist v. Caldwell, 230 Ga. 536, 540 (1973). Nor is the State in a habeas corpus proceeding under any right to provide funds for an investigator to prepare for litigation in a habeas corpus petition. Bowden v. Zant, 244 Ga. 260, 264 (1979); Spencer v. State, 243 Ga. 532 (1979); Ross v. Hopper, 240 Ga. 369 (1977).

MENTAL INCOMPETENCE

Under this count of the amended petition, Petitioner states that prior to trial and resentencing trial he exhibited characteristics and behavior which would indicate that he was mentally incompetent, and that he should have been given a psychiatric examination. There is no evidence of this in either the first trial or at the resentencing trial. See, Pulliam v. Balkcom, 245 Ga. 99(1) (1980). See, Respondent's Exhibit Nos. 2 and 7. The fact that an individual may be illiterate, or be of a low educational level does not equate with the conclusory allegation that he is mentally incompetent and in need of a psychiatric examination. There is no evidence whatsoever to establish that the Petitioner was mentally incompetent at the time of his trial. Neither is there any evidence that during the trial he exhibited behavior calling for a psychiatric examination, See, Drope v. Missouri, 420 U.S. 162 (1975). This Court finds this contention to be without merit as there is nothing in the record which would have placed a trial judge on notice that the Petitioner needed a psychiatric examination, or that he was mentally incapable of either cooperating with counsel or unable to understand the nature of the charges against him or the courtroom proceedings.

MISCELLANEOUS CONTENTIONS

Petitioner states that due process was violated because the Supreme Court of Georgia did not properly compare his case with other similar cases. The Fifth Circuit in the case of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), specifically held that it would not be the function of courts in habeas corpus to review case by case comparisons by the state's appellate courts. Corn v. Hopper, 244 Ga. 28 (1979). This allegation is without substance.

Next Petitioner argues that the evidence concerning the aggravating circumstances was inadequate as a matter of law to support this finding. This matter was directly ruled on by the Supreme Court of Georgia in its reconsideration of the Petitioner's trial for sentencing. Fleming v. State, 243 Ga. supra at 123. There the court stated, "The verdict is factually substantiated." Id. Moreover, the Supreme Court of Georgia found that the death penalty in this case was not excessive or disproportionate to the penalty imposed in similar cases, when considering both the crimes and the defendant. Id. Even by applying the standard of review in Jackson v. Virginia, ___U.S.___, 99 S.Ct. 228 (1979), this argument is without merit.

The issue as to a denial of the right to a speedy trial was raised on direct appeal, and may not be renewed again in habeas corpus. Strozier v. Hopper, 234 Ga. 597, 598 (1975).

Likewise the allegation that the review by the Supreme Court of Georgia is inadequate in that the Court did not in its review discuss the mental competency of the Petitioner is without merit. As noted earlier, mental competency was not an issue in this case,

and the sufficiency of the review conducted by the Supreme Court of Georgia is not a matter which is to be second guessed and reexamined in habeas corpus. Spinkellink v. Wainwright, supra; Corn v. Hopper, supra.

EFFECTIVENESS OF COUNSEL

The general allegation of ineffective assistance of counsel contains the following specific contentions that the Petitioner was denied his Sixth Amendment right to effective assistance of counsel as follows: that because of the age of his attorneys they were incapacitated; his attorneys failed to investigate; they were not aware of his confession; they failed to ask for a mental competency hearing; they failed to move for a change of venue based on pretrial publicity; they did not seek to exclude the Petitioner's confession; they did not properly examine jurors in light of Witherspoon v. Illinois, supra; they failed to object to certain of the prosecutor's innuendoes during his closing arguments; the appellate briefs they filed were inadequate; and, they failed to challenge the grand and traverse juries.

This Court specifically finds from its reading of both trial transcripts, that the performance of the Petitioner's appointed and retained counsels does not evidence any incapacity because of their age. The cross-examination and examination of potential jurors and witnesses shows that these two lawyers vigorously represented the Petitioner. Their questions on cross-examination show astuteness, and familiarity with the facts, which belies the Petitioner's contention that they did not investigate the charges against him. While the Petitioner's attorneys argued that they were not made aware of the fact that the State had a confession, this contention is belied by a motion to suppress the confession (R. 30-32), and the discussion which occurred at a motion hearing held in January of 1977, before the beginning of the first trial.

> "'Now, Judge, there's one other issue that's raised in the first paragraph under 4, that I think might bear mentioning. He indicates that

he signed a confession that was induced by -- the inference being that it was coerced. Now of course if such is the case, a Jackson v. Denno hearing would be in order at the proper time during the trial.

THE COURT: That's right, before they can introduce any confession we'll have a hearing ~~and ask~~ outside the presence of the Jury, to determine if its admissible.

MR. ZEESMAN: We realize that's the law. Your Honor.'"

See, transcript of January hearing at pages 19-20.

Neither is there any evidence whatsoever that the Petitioner was mentally incompetent which would have required counsel to have moved for a psychiatric examination. See, Pulliam v. Balkcom, 245 Ga. 99 (1980).

Also without merit is the contention that Petitioner's attorneys were ineffective because they failed to move for a change of venue based on pretrial publicity. An examination of the voir dire proceeding of the first trial which was held in Lanier County, shows that of the sixty-seven potential jurors, four were excused because they could not dismiss the pretrial publicity they had experienced, which means that five percent of the jurors excused were excused because of pretrial publicity; three were excused because of bias towards the accused or in all between basic bias and pretrial publicity ten percent were excused.

Two jurors were excused for other reasons, one because he knew one of the witnesses and the other because of age and physical problems. The voir dire proceeding shows that potential jurors Harrell (T. 38-39), Livingston (T. 48-49), Spell (T. 95-96), and Bradford (T. 106), were excused because of pretrial publicity. Juror Register was excused because he was related to Sheriff Bradley. (T. 8). Jurors Ginlock (T. 6-7), Simpson (T. 32), and Yeomans (T. 60) were excused because they had a bias or prejudice opinion either towards the accused or the State. Juror Metts was excused because he knew the victim. (T. 54). It is interesting to note that three jurors specifically stated that while they had read the newspaper accounts they felt that they could either shut them out, or did not believe what they read in the paper. These were jurors Mullis (T. 82), Spradley (T. 91), and Dorsey (T. 113). As evidenced by the exceedingly small percentages of partiality which was shown in the first trial, the fact that the attorneys did not move for a change of venue based on pretrial publicity is unfounded, and does not establish ineffective assistance of counsel. Collier v. State, 244 Ga. 553, 572 (1979). The second trial which dealt with sentencing was moved to a different county, and for the reasons stated earlier in this Order concerning the jury issue, this Court finds that the facts and the percentages of those who either had a preconceived bias for or against the defendant or the State as well as those who had a bias based on pretrial publicity was exceedingly small.

The Petitioner says that his attorneys were ineffective because they failed to move to exclude his confession for lack of voluntariness. As noted in an earlier discussion on this matter, the trial court held a hearing under Jackson v. Denno, supra, and found the statement elicited from the Petitioner to have been freely and voluntarily given. The evidence in this matter

supports such a contention by a preponderance of the evidence and the fact that it was not excluded does not show ineffective assistance of counsel. Willis v. State, 243 Ga. 185, 191 (1979).

Also without merit is the contention that the attorneys failed to ask adequate questions concerning jurors who expressed a belief that they could not impose the death penalty regardless of the evidence presented. Petitioner contends that additional questions should have been asked in hopes of obtaining from the jurors the fact that they were not unalterably opposed to the death penalty regardless of the evidence. An examination of the jury selection process in both trials shows that the jurors who were excused under Witherspoon v. Illinois, supra, as further reiterated by the United States Supreme Court in Lockett v. Ohio, ___U.S.___, 98 S.Ct. 2954 (1978); Collier v. State, supra, clearly establishes that those jurors were properly excused, and that any further cross-examination by Petitioner's attorneys would not have changed the outcome or have resulted in those jurors being seated. Finney v. State, 242 Ga. 582 (1978). See also, Willis v. State, 243 Ga. 185, 188(4) (1979).

Petitioner says that his attorneys were ineffective because they did not object to certain subtlies and innuendoes made during the closing arguments by the prosecutor and the assistant prosecutor. This matter has been previously discussed, but in connection with that issue this Court notes that the matter concerning the character of the Petitioner was first brought out on cross-examination by the Petitioner's attorneys. The decision as to whether to object or not to object to the argument of counsel is basically one of trial tactics. In the absence of any testimony that these tactics were outside the bounds normally elicited from counsel, this matter is without substance. See, Reid v. State, 235 Ga. 378, 379 (1975).

Petitioner also argues that he was denied effective assistance of counsel because the only testimony which was offered in his behalf at the sentencing hearing was his own testimony, and that this violates his constitutional rights. The decision as to whether any testimony is to be elicited through the Petitioner, or through other witnesses is a matter which rests in the discretion of the trial attorneys. There has been no evidence presented to show that the decision to present solely the testimony of the Petitioner during the sentencing phase of the trial amounts to a constitutional deprivation. See, Reid v. State, 235 Ga. 378 (1975); McAllister v. State, 231 Ga. 368, 369 (1973); Coco v. United States, 569 F.2d 367 (5th Cir. 1978).

Another matter which the Petitioner alleges constitutes ineffective assistance of counsel is the contention that his attorneys failed to challenge the grand and traverse jury composition. As noted earlier, the time to challenge the composition of a grand jury is prior to indictment. Consequently, since counsel was not appointed until after indictment a challenge would not have been timely. See, Tennon v. State, 235 Ga. 594 (1975). This general assertion of counsel's ineffectiveness for not challenging the grand and traverse juries, particularly since there has been no showing of cause for not challenging, or that actual prejudice resulted, is unfounded. Goodwin v. Hopper, 243 Ga. 193, 194(2)(a) (1979); Harris v. Hopper, 243 Ga. 244, 245(2) (1979).

The Petitioner has also alleged that the appellate briefs filed with the Supreme Court of Georgia were inadequate. It is well settled that the question as to what issues are to be raised on appeal is a matter which rests within the discretion of the

attorneys. Reid v. State, 235 Ga. 378, 379 (1975). See also, Young v. State of Oklahoma, 428 F.Supp. 288 (D.C. Ok. 1976); Hooks v. Roberts, 480 F.2d 1196 (5th Cir. 1973). This Court takes particular notice that in the first appeal Petitioner's attorneys were successful in getting the matter remanded for a new trial for sentencing, which in the Court's view does not establish ineffective assistance of counsel because of the type of appellate brief which was filed. Fleming v. State, 240 Ga. 142 (1977).

Petitioner further argues that the attorneys' decision to request a charge concerning murder and conspiracy to commit murder was improper in that it improperly confused the elements of murder and conspiracy to commit murder. Even though an individual is charged with a substantive offense, such as murder, and there is evidence to establish that others may be involved, it has been held by the Supreme Court of Georgia that it is not error to charge on conspiracy. Thomas v. State, 242 Ga. 716, 717 (1978); Battle v. State, 231 Ga. 501 (1973). Sub judice, the evidence in this case clearly established that the Petitioner and others were involved in the murder of the police chief. On pages 509 through 511 in Respondent's Exhibit No. 7, the trial court's instructions on conspiracy are set forth. The court's recharge on the law of conspiracy appears in Respondent's Exhibit No. 7 at pages 516 through 518. The court's charge on conspiracy does not confuse or interject any irrelevant and immaterial matters, but is a correct statement of the law concerning conspiracy when construed with a substantive crime such as murder. The court's charge on conspiracy is not misleading or confusing, and as a matter of fact this matter was addressed in headnote 3 by the Supreme Court of Georgia when it initially affirmed Petitioner's conviction. Fleming v. State, 240 Ga. supra at 145. Herring v. Ault, 230 Ga. 398 (1973).

When the jurors asked for a recharge on conspiracy, Respondent's Exhibit No. 7 at page 576, which was given, they expressed no further need for clarification. Respondent's Exhibit No. 7 at page 518. Dixon v. Balkcom, 614 F.2d 1067 (5th Cir. 1980).

Petitioner charges that at his sentencing hearing in Cook County that one of his attorneys argued to the jury that the Petitioner was lying in his testimony. This the Petitioner says evidences an abandonment by his lawyer of his best interests, and as such amounts to a denial of his right to effective assistance of counsel under the Sixth Amendment. To the contrary, on page 454 of the resentencing proceeding which appears as Respondent's Exhibit No. 2, this Court will find that Attorney Parrish said for the purposes of argument that, "But, lets say that Son's wrong about that. Let's say that I'm gullible and believed him from the start that he told me." Further on during the attorney's argument at pages 465 and 466 the attorney says that even if his client did not tell the truth it was because he was afraid, and this is certainly a reasonable and plausible explanation of the defendant's testimony of a man who was afraid. Therefore, the attorney's comment in his summation provided a plausible explanation to what the State catagorized as a lie, this being the Petitioner's testimony that he confessed after having been beaten. Petitioner's counsel was painting a picture of his client as a man who was trapped, ignorant, and afraid.

This Court concludes that based upon all of the above Petitioner was not denied effective assistance of counsel. Pitts v. Glass, 231 Ga. 638 (1974). Accord, Pitts v. Hopper, 402 F.Supp. 119 (N.D. Ga. 1974), aff'd 502 F.2d 941 (5th Cir. 1975).

CONCLUSION

For all the above and foregoing reasons this Court concludes that none of the Petitioner's constitutional rights were violated. Consequently, the Petitioner is remanded to the Respondent's custody so that the sentence of death as imposed by the trial court can be carried out. The stay of execution issued by this Court on March 14, 1980, is vacated.

IT IS SO ORDERED.

This 1st day of July, 1980.

Paul E. Caswell

PAUL E. CASWELL, Senior Judge

APPENDIX A

COOK COUNTY PROCEEDINGS

Of the first 14 jurors impaneled and examined, potential juror Sharon T. Flythe stated that while she did not know the Petitioner, she had made a decision based upon what she had read and heard and that she could not be an impartial juror. (T. 4, 5, Respondent's Exhibit No. 2). At the request of Petitioner's counsel potential juror Flythe was excused after being challenged for cause. (T. 6, Respondent's Exhibit No. 2). Potential juror Sharon T. Fythe was the only person in the first panel of 14 who had formed any opinion about the case. In a further examination of this panel of 14, when it came time to select members from that panel, none of the remaining jurors questioned either knew the Petitioner or had formed any fixed opinion in the case. See, Respondent's Exhibit No. 2 at pages 13-16.

In the second panel of 14, Respondent's Exhibit No. 2 at page 16, there was no response from any of those potential jurors as to whether they had formed an expressed opinion as to the guilt or innocence of the accused. When it came time for each of the members of the second panel to be individually asked or questioned after they were generally examined on the statutory questions, only one potential juror stated that she knew Fleming. Respondent's Exhibit No. 2 at pages 25 through 26. The remaining jurors had no personal involvement with either the victim or any of the other State witnesses. Respondent's Exhibit No. 2 at pages 21 through 27.

In the third panel of 14 potential jurors, again, none of these potential jurors stated that they had any prejudice or bias resting on their minds either for or against the Petitioner, or that they had formed any judgment ahead of time. Respondent's Exhibit No. 2 at page 27. Likewise, none of the potential jurors in the third panel knew the Petitioner or any of the other participants in the case. (T. 27, Respondent's Exhibit No. 2).

In the fourth panel of 14 potential jurors there was again a negative response from the inquiries concerning whether any of these potential jurors had formed any opinion as to the guilt or innocence of the accused, Respondent's Exhibit No. 2 at page 34, or whether they had any bias or prejudice resting either for or against the Petitioner. Respondent's Exhibit No. 2 at page 35. There was also a negative response concerning whether any potential jurors were related to either any of the participants in the trial or to the victim. Respondent's Exhibit No. 2 at page 36.

LANIER COUNTY PROCEEDINGS

In examining the voir dire in the first proceedings which took place in Lanier County, this Court finds as follows: Of the first panel of 14 potential jurors, jurors Ginlock and West stated that they had formed an opinion concerning the guilt or innocence of the Petitioner, and for that reason they were excused for cause. See, Respondent's Exhibit No. 7, at pages 6-7, 11-14.

Later, potential juror Ruth B. Harrell was excused because she was unable to lay aside an opinion as to the Petitioner's guilt based upon what she had read. Respondent's Exhibit No. 7 at pages 38-40. Potential juror Livingston was also challenged for cause for the same reason. See, Respondent's Exhibit No. 7 at pages 48-49. Potential juror Metts was also disqualified for the same reason. Respondent's Exhibit No. 7, pages 54-55.

In the second group of 24 potential jurors the following jurors were stricken for cause because they were not able to maintain on open-mindedness or impartiality: Juror Yeomans (Respondent's Exhibit No. 7, page 60); Juror Spell (Respondent's Exhibit No. 7, page 95).

In the remaining group of potential jurors called, only one was disqualified for cause as having formed an opinion concerning the guilt of the Petitioner: Bobby Dean Bradford (Respondent's Exhibit No. 7, page 106).

The Petitioner's assertion that pretrial publicity made it impossible to impanel a jury either in Lanier or Cook Counties is unsupported by the evidence contained in Respondent's Exhibits Nos. 2 and 7.

While there were some potential jurors in both proceedings who had formed a fixed opinion as to the guilt or innocence of the Petitioner, the answers elicited from all potential jurors in both trials fails to support the Petitioner's contention that it was impossible to impanel an impartial jury. Those jurists who had formed fixed opinions were properly disqualified, and there has absolutely been no showing whatsoever that from the panels of potential jurors in both counties that it was impossible to impanel an impartial jury, or that venue in both trials should have been changed. See, Murphy v. Florida, 421 U.S. 794 (1974); Collier v. State, 244 Ga. 573 (1979); Campbell v. State, 240 Ga. 352, 357 (1977); Young v. State, 239 Ga. 53, 56 (1977); Coleman v. State, 237 Ga. 84 (1976); Krist v. Caldwell, 230 Ga. 536 (1973).

the oral contract was either for a period less than a year and did not fall within the Statute of Frauds or, if within the statute, was removed by part performance. The part performance alleged was the giving up of employment with a telegraph company to accept a position as a teacher in a telegraph operator's school. The benefit to the employer found by the court was the mere availability of the employee to work for him. In light of the language and rationale of the part performance statute and the other cases interpreting it, the *Bagwell* case must also be disapproved.

The Court of Appeals correctly affirmed the grant of Venture Industries' motion for summary judgment by the trial court.

Judgment affirmed. All the Justices concur.

ARGUED JANUARY 8, 1979 — DECIDED JANUARY 24, 1979 — REHEARING DENIED FEBRUARY 14, 1979.

Certiorari to the Court of Appeals of Georgia—147 Ga. App. 31 (248 SE2d 9) (1978).

Brinson, Askew & Berry, Robert M. Brinson, Robert N. Farrar, for appellant.

Sutherland, Asbill & Brennan, Thomas A. Cox, Alfred A. Lindseth, D. R. Cumming, Jr., for appellees.

34192. FLEMING v. THE STATE.

MARSHALL, Justice.

The appellant, Son H. Fleming, was convicted in the Lanier Superior Court of the murder of Police Chief James Giddens of Ray City, Georgia. The jury imposed the death penalty, finding two statutory aggravating circumstances: (1) "The offense of murder was committed against Police Chief James Edward Giddens, a police officer, while he was engaged in the performance of his duties," Code Ann. § 27-2534.1 (b) (5) (Ga. L. 1973, pp. 159, 163); and (2) "The offense of murder was committed while the Defendant was engaged in the commission of another capital felony, to wit: kidnapping of and bodily injury to

James Edward Giddens, a human being." Code Ann. § 27-2534.1 (b) (2).

On direct appeal to this court, the appellant's murder conviction was affirmed, but his death sentence was set aside, because the court had failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance. See *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1977). On remand, the appellant's motion for change of venue was granted, and his retrial on the question of punishment was held in the Cook Superior Court. The jury again sentenced the appellant to death, finding the same two statutory aggravating circumstances as found at his original trial. This is the appeal. A factual summary of the case is amply set out in *Fleming v. State*, supra, and will be repeated here as is necessary for a consideration of the enumerations of error raised.

1. In the first and eighth enumerations of error, the appellant contends that the evidence is insufficient to support imposition of the death penalty. The real question which these enumerations of error raise is whether the evidence supports the jury's finding of statutory aggravating circumstances. See Code Ann. § 27-2537 (c) (2) (Ga. L. 1973, pp. 159, 165).

The evidence presented at retrial on the question of punishment was substantially the same as the evidence presented at the original trial. This evidence authorized the jury in finding that Larry Fleming, Henry Willis, and the appellant were stopped by Police Chief Giddens after two black males identified as Larry Fleming and Henry Willis had robbed a grocery store in a car driven by the appellant. Giddens' bullet-riddled body was later found. The testimony of a fellow inmate at the Cook County jail indicated that the appellant admitted driving the car while the others robbed the grocery store, and that the appellant had participated in shooting Giddens.

The evidence supports the jury's finding that the appellant is guilty of murdering Police Chief Giddens while Giddens was engaged in the performance of his duties and while the appellant was engaged in the commission of another capital felony, to wit: the kidnapping with bodily injury of Policy Chief Giddens.

EXHIBIT D

This enumeration of error is, accordingly, without merit.

2. In the second enumeration of error, the appellant argues that the trial court, in effect, coerced the jury into returning a verdict by delaying providing the jurors the evening meal, and by keeping the jury in session beyond a normal working day.

A review of the transcript fails to disclose any evidence to substantiate this argument. Nor does it appear that the appellant raised any objection to this at trial. We, therefore, find this enumeration of error to be without merit.

3. The third enumeration of error, in which the appellant argues that the death penalty constitutes cruel and unusual punishment, is also without merit. See Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976).

4. In the fourth enumeration of error, the appellant argues that under Code Ann. § 27-2503 (Ga. L. 1974, pp. 352, 357), only the jury trying the issue of guilt or innocence can sentence the accused to death. Thus, the appellant argues that since the court set aside the death sentence imposed by the jury returning a verdict of guilty on the murder charge, he could not subsequently be given the death penalty.

The argument made by the appellant in this enumeration of error has been decided adversely to him in *Miller v. State*, 237 Ga. 557 (229 SE2d 376) (1976), where it was held that a new sentencing trial can be held before a new jury where the jury convicting the accused also sentences him to death and the death sentence is set aside on appeal due to some error infecting the sentence.

5. In the fifth and seventh enumerations of error, the appellant argues that the trial court erred in failing to make clear to the jury that they could recommend a life sentence, for any reason whatsoever, without making a finding of mitigating circumstances.

The standard for determining the correctness of a jury charge during the sentencing stage of a death penalty case is found in *Spivey v. State*, 241 Ga. 477, 481 (246 SE2d 288) (1978). We have reviewed the jury charge in the present case, and we find it to be in compliance with *Spivey*. This enumeration of error is without merit.

6. In the sixth enumeration of error, the appellant argues that the trial court erred in allowing the state to read to the jury the testimony of a witness at the prior trial without showing that this witness was legally inaccessible, within the meaning of Code § 38-314.

There was no objection made to the admissibility of this testimony at trial, and the defendant can not complain of the admissibility of testimony for the first time on appeal. *Mallory v. State*, 230 Ga. 657 (2) (198 SE2d 677) (1973); *Starr v. State*, 229 Ga. 181 (190 SE2d 58) (1972). This enumeration of error is without merit.

7. Finally, we must determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor (Code Ann. § 27-2537 (c) (1)) and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code Ann. § 27-2537 (c) (3).

We find no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. The verdict is factually substantiated.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which death or life sentences were imposed and find the similar cases listed in the appendix support the affirmance of the death penalty in this case. Son H. Fleming's sentence to death is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant.

Judgment affirmed. All the Justices concur.

ARGUED NOVEMBER 13, 1978 — DECIDED JANUARY 24, 1979 — REHEARING DENIED FEBRUARY 14, 1979.

Resentencing for murder. Cook Superior Court. Before Judge Lott.

Edward Parrish, Benjamin Zeesman, for appellant.

Vickers Neugent, District Attorney, Terry Barnick, Assistant District Attorney, Arthur K. Bolton, Attorney General, John W. Dunsmore, Jr., Assistant Attorney General, for appellee.

APPENDIX.

Johnson v. State, 226 Ga. 378 (174 SE2d 902) (1970); *Callahan v. State*, 229 Ga. 737 (194 SE2d 431) (1972); *Whitlock v. State*, 230 Ga. 700 (198 SE2d 865) (1973); *Bennett v. State*, 231 Ga. 458 (202 SE2d 99) (1973); *Ross v. State*, 233 Ga. 361 (211 SE2d 356) (1974); *Spencer v. State*, 236 Ga. 697 (224 SE2d 910) (1976).

34205. JONES v. DALLAS.

HILL, Justice.

In this suit for specific performance of a written real estate sales contract, the trial court directed a verdict for the buyer. In essence, the contract provided for the sale of 454.88 acres at $550 per acre ($250,184) payable in 240 monthly installments (20 years) of $1,032.01 each, "the purchase price being a total price for the entire acreage with no interest being included in addition to the monthly installment."

The seller refused to execute the tendered deed or to accept monthly payments and the buyer filed suit for specific performance.[1] At the close of the evidence, both sides moved for directed verdict and the trial court granted the buyer's motion.

The evidence relied upon by the buyer, and the only evidence offered, to show the fairness and adequacy of the sales price was the testimony of the seller, who testified as follows:

"Q. [Seller], would you be willing today to sell this land to Mr. Dallas for the contract price of $550? A. I will. Q. All right. But you don't want it over a twenty year period? A. I don't want it over twenty years like it is."

Code § 37-805 provides that inadequacy of price may

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[1]After signing the contract, the seller apparently learned that the IRS would treat this "no interest" sales contract as including ordinary interest in the deferred payments.

justify a court in refusing to decree specific performance. "This court has repeatedly held that in order for a suit for specific performance of a contract for the sale of land to prevail, the plaintiff must prove the value of the property so as to enable the court to determine that the contract was fair, just and not against good conscience. [Cits.]" *Moody v. Mendenhall*, 238 Ga. 689 (6) (234 SE2d 905) (1977).

The question for decision thus is whether the seller's admission that he would be willing to sell this land for the contract price of $550 per acre, but not over a 20 year period, satisfied the requirement that the plaintiff must prove the value of the property so as to enable the court to determine that the contract was fair, just and not against good conscience.

The value of property at a price payable immediately in lump sum is considerably greater than at that same price but payable over a period of several years without interest. We find that the plaintiff's proof failed to justify the decree of specific performance in his favor and the court should have granted the defendant's motion for directed verdict on that issue.

Judgment reversed. All the Justices concur, except Jordan and Hall, JJ., who concur in the judgment of reversal but dissent to the granting of the defendant's motion for directed verdict.

ARGUED NOVEMBER 14, 1978 — DECIDED JANUARY 23, 1979 — REHEARING DENIED FEBRUARY 14, 1979.

Specific performance. Warren Superior Court. Before Judge Stevens.

Walton Hardin, for appellant.

Pernell Davis, W. Tom Veazey, Samuel Fowler, Jr., for appellee.

34273, 34274. EARLY v. EARLY; and vice versa.

BOWLES, Justice.

Appellant-wife filed a complaint in DeKalb Superior Court seeking a divorce, temporary and permanent

William H. Ison, District Attorney, Clifford A. Sticher, Assistant District Attorney, Arthur K. Bolton, Attorney General, G. Stephen Parker, Assistant Attorney General, for appellee.

APPENDIX.

Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974); *Moore v. State*, 233 Ga. 861 (213 SE2d 829) (1975); *Floyd v. State*, 233 Ga. 280 (210 SE2d 810) (1974); *Jarrell v. State*, 234 Ga. 410 (216 SE2d 258) (1975); *Mitchell v. State*, 234 Ga. 160 (214 SE2d 900) (1975); *Berryhill v. State*, 235 Ga. 549 (221 SE2d 185) (1975); *Dobbs v. State*, 236 Ga. 427 (224 SE2d 3) (1976); *Goodwin v. State*, 236 Ga. 339 (223 SE2d 703) (1976); *Pulliam v. State*, 236 Ga. 460 (224 SE2d 8) (1976); *Birt v. State*, 236 Ga. 815 (225 SE2d 248) (1976); *Prior v. State*, 238 Ga. 698 (234 SE2d 918) (1977); *Young v. State*, 239 Ga. 53 (236 SE2d 1) (1977).

32344. FLEMING v. THE STATE.

HALL, Justice.

This is the direct appeal of the conviction and death sentence of Son H. Fleming, who was convicted of the murder of Police Chief James Giddens of Ray City, Berrien County.

The state presented evidence from which the jury was entitled to find the following:

Appellant borrowed a red and white Ford car from a friend on February 11, 1976. Around 10 or 10:30 p.m. that day a grocery store in Adel (Cook County) was robbed by two black males identified as Larry Fleming (appellant's nephew) and Henry Willis. One robber was armed with a nickel-plated .22 caliber gun. The stolen money was stuffed in a paper sack, and a carton of Kool cigarettes was also stolen.

The red and white Ford (apparently occupied by two black males) passed through Ray City shortly after the robbery, and aroused the suspicion of Chief Giddens, who had heard of the robbery over his radio. Chief Giddens pursued the car, and reported [illegible] (including the

license plate number) of it by radio. Minutes later Giddens' police car was found abandoned by a friend with whom he had been talking prior to the pursuit. Giddens' disappearance was reported, and at 12:30 a.m. the red and white car was stopped; its three black male occupants (appellant, his nephew, and Willis) were arrested. Giddens' .357 magnum pistol, a nickel-plated .22 revolver, a brown sack of money, and a carton of Kool cigarettes were found in the car.

Giddens' body was found in a pond in Lanier County. He had been shot several times. Powder burns and the patterns of ratshot from the .22 pistol indicated that some of the wounds were made at a range of less than 18 inches. One bullet recovered from the body was fired from Giddens' gun.

After his arrest appellant made a number of statements. He initially stated that his nephew and Willis had borrowed the car from him before the robbery, and that he did not see them again until they picked him up shortly before the arrest.

His next statement indicated that he had been picked up after the robbery, but before the pursuit by Chief Giddens. He stated that the three of them were stopped by Giddens, and when the policeman attempted to search the car he was overpowered and abducted by the other two. Appellant claimed that he was forced to drive the car while his nephew and Willis held Giddens at gunpoint. After Giddens told them of his report of the license number of the car, they drove to a remote area and let him out. When Giddens ran in an attempt to escape, both Larry Fleming and Willis shot at him. Giddens fell wounded into the nearby lake; Larry Fleming and Willis followed him there. Appellant heard additional shots. This statement also indicated that appellant begged the other two not to kill Giddens, and that he acted only out of fear of them.

The testimony of a fellow inmate at the Cook County Jail indicated that appellant admitted driving the car while the others robbed the store, and that it was appellant who first shot at Giddens as he ran. At all times appellant has denied having shot Giddens as he stood helpless in the water. Appellant denied making this last

EXHIBIT E

statement to the fellow inmate.

Appellant's only evidence in defense was his own testimony, in which he returned to his first story. In the sentencing phase his counsel presented no additional evidence of mitigating circumstances, relying on the evidence at the guilt phase. Appellant's personal history sheet shows no convictions for serious or violent crimes, and a long history of employment (more than twenty years) in various jobs. He was 46 at the time of the murder.

1. Appellant was arrested on the morning after the murder, February 12, 1976, and tried beginning on January 24, 1977. The delay was caused in part by the infrequency of the terms of court in Lanier County, which are held only twice a year, in January and September. Another factor in the delay was a request for a continuance by defense counsel. No demand for trial was made.

Appellant asserts that the delay alone entitled him to a discharge for denial of a speedy trial. This is not the law. Barker v. Wingo, 407 U. S. 514, 523 (1972); *Bryant v. State*, 236 Ga. 495 (224 SE2d 369) (1972). Although we have not previously said so, we have used the same standards for deciding claims of denial of a speedy trial, whether the claim is based on the Sixth Amendment to the United States Constitution, or Sec. I, Par. XI of the Constitution of the State of Georgia (Code Ann. § 2-111). See *Hughes v. State*, 228 Ga. 593 (187 SE2d 135) (1972). In deciding whether there has been a denial of the right to a speedy trial several factors must be considered, including the length of the delay, the reason for the delay, any actual prejudice to the defendant, and whether or not the defendant asserted the right. *Bryant v. State*, 236 Ga. at 495.

Because appellant asserts that delay alone is enough, we have no assertions of prejudice (other than that incident to being incarcerated before trial). Appellant never asserted the right other than by a motion for discharge. The time period was not extreme, and appellant is at least partly responsible for the delay. The trial court correctly denied the motion for discharge. See *Bryant v. State*, 236 Ga. at 495.

2. The evidence established that although Giddens' wounds were mortal, the immediate cause of death was drowning. Appellant requested a charge to the effect that the jury should acquit appellant if the cause of death was drowning rather than the gunshot wounds alleged in the indictment. The trial court correctly refused this charge. The evidence established that the wounds were the proximate cause of the death. See *Ward v. State*, 238 Ga. 367, 369 (233 SE2d 175) (1977).

3. Appellant objected to one sentence of the charge and recharge on conspiracy. Reading the charge as a whole, the jury was properly instructed on this issue.

4. No charge on the necessity that a verdict be unanimous was requested, and none was given. Appellant complains of this for the first time on appeal. If there was any doubt as to the unanimity of the verdict, the jury could have been (but was not) polled. Absent a request for a charge on unanimity, and absent a request that the jury be polled, we will not reverse a conviction for failure to give such a charge unless it appears that the jury was in fact mislead into believing that a less than unanimous verdict would be lawful. See *Blake v. State*, 239 Ga. 292, 298 (236 SE2d 637) (1977); *Porter v. State*, 141 Ga. App. 602 (234 SE2d 100) (1977). There is no indication that the jury was mislead in this case.

5. There was sufficient evidence to sustain the verdict, thus under the "any evidence" test we cannot reverse on the so called "general ground." *Cunningham v. State*, 235 Ga. 126 (218 SE2d 854) (1975). Appellant's argument that the evidence raised a reasonable doubt as to his guilt could properly be considered only by the trial court. See *Mills v. State*, 188 Ga. 616 (4 SE2d 453) (1939).

Death Sentence Review

Appellant's remaining enumerations of error are considered as part of our mandatory death sentence review. Code Ann. § 27-2537.

The jury found two statutory aggravating circumstances: "(1) The offense of murder was committed against Police Chief James Edward Giddens, a peace officer, while he was engaged in the performance of his duties. (2) The offense of murder was committed while the

Defendant was engaged in the commission of another capital felony, to wit: kidnapping of and bodily injury to James Edward Giddens, a human being."

6. In *Prevatte v. State*, 233 Ga. 929 (214 SE2d 365) (1975), we held that it was reversible error for the prosecutor to mention to the jury in his arguments during the death penalty phase, that any sentence of death would be reviewed by the trial judge and this court, and that the sentence could be set aside. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence by making predictions of the consequences of the jury's verdict.

In this case the prosecutor made such a statement to the jury. Defense counsel objected, and the trial court ruled: "All right, that would not be proper and I'd instruct the Jury to disregard that." This is not an adequate curative instruction. In *Coker v. State*, 234 Ga. 555, 570 (216 SE2d 782) (1975), revd. in part, 433 U. S. — (97 SC 2861, 53 LE2d 982) (1977), the court gave more extensive, and far clearer instructions to the jury. We held that those instructions were adequate; we are not prepared to hold that the minimal instructions in this case are enough, since this type of remark has an unusual potential for corrupting the death sentencing process. *Prevatte v. State*, 233 Ga. at 931. The jury is given the heavy burden of making the decision of whether the defendant will live or die. Comments about appellate safeguards on the death penalty suggest to the jury that they can pass the responsibility for the death sentence on to this court.

If the jury is exposed to such comments, the trial court should explain to the jury that it is the responsibility of each juror to decide whether the defendant will be executed, and that they cannot pass that responsibility on to anyone else. They should be told to decide on the penalty as if there was no possibility of any review of the sentence.

7. Reading the charge to the jury in the sentencing phase as a whole, we agree with appellant that the court failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance. Our system for deciding whether a death sentence is to be given requires the jury to consider two issues in the sentencing phase. First, the jury must consider if the state has proven the existence of at least one statutory aggravating circumstance (Code Ann. § 27-2534.1 (b) (1—10)), beyond a reasonable doubt. Second, if one of these circumstances is found, the jury must then consider the mitigating and aggravating circumstances relevant to the defendant and determine whether the death penalty is appropriate in this case.

Judgment affirmed as to the conviction, vacated as to the sentence, and a new trial is ordered on the question of punishment. All the Justices concur, except Bowles, J., who concurs in the judgment, but dissents as to Division 6, and Jordan, J., who dissents.

ARGUED JUNE 13, 1977 — DECIDED NOVEMBER 8, 1977.

Murder. Lanier Superior Court. Before Judge Lott.

Benjamin Zeesman, Edward Parrish, for appellant.

Vickers Neugent, District Attorney, Arthur K. Bolton, Attorney General, John W. Dunsmore, Jr., Assistant Attorney General, for appellee.

32521. KARP v. NIVER et al.

PER CURIAM.

After further consideration of the decision in *Karp v. Niver*, 142 Ga. App. 241 (235 SE2d 589) (1977), this court has decided that the writ of certiorari was improvidently granted.

Case dismissed. All the Justices concur, except Hill, J., who dissents, and Marshall, J., who is disqualified.

ARGUED SEPTEMBER 21, 1977 — DECIDED NOVEMBER 8, 1977.

Certiorari to the Court of Appeals of Georgia—142 Ga. App. 241 (235 SE2d 589) (1977).

Lee & Clark, Fred S. Clark, for appellant.

A. Marvin Kent, A. Parker Barnes, Jr., for appellees.

EXHIBIT F

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)

EXHIBIT G

of the

Superior Court of Cook County, Georgia

The State vs. SON FLEMING
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

Name FLEMING SON H 2. Date of Birth 5 - 4 - 30
Last First Middle Mo. Day Year

Social Security Number UNKNOWN
Sex M [✓] 5. Marital Status: Never Married [ ]
F [ ] Married [✓]
Divorced [ ]
Spouse Deceased [ ]

Children
(a) Number of children 1
(b) Ages of children: 1 2 3 4 (5) 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)

Father living: Yes [✓] No [ ] If deceased, give date of death _____
Mother living: Yes [✓] No [ ] If deceased, give date of death _____
Number of children born to parents 3
Education--Highest Grade Completed: 1 2 3 4 5 (6) 7 8 9 10 11 12 13 14 15 16 17
(Circle one) [college]

Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [✓]
(IQ above 100) High [ ]

Psychiatric Evaluation Performed: Yes [ ] No [ ]
If performed is defendant:
a. Able to distinguish right from wrong? [ ] [ ]
b. Able to adhere to the right? [ ] [ ]
c. Able to cooperate intelligently in his own defense? [ ] [ ]
If examined, were character or behavior disorders found? Yes [ ] No [ ]
(If answer is yes, please elaborate) _____

What other pertinent psychiatric [and psychological] information was revealed?

Prior work record of defendant:

Type Job	Pay	Dates Held	Reason for Termination
a. LANDSCAPING		DON'T KNOW	
b.			
c.			
d.			
e.			

*A separate report must be submitted for each defendant sentenced to death.

Was the case tried with or without jury? With [✓] Without [ ]

How did the defendant plead? Guilty [ ] Not guilty [✓]

C. Offense Related Data

Capital Offense for Which Penalty Imposed:

a. Treason . . . . . [ ]
b. Murder . . . . . [✓]
c. Kidnapping for Ransom . . . . . [ ]
d. Kidnapping where Injury Results . . [ ]
e. Aircraft Hijacking. . . . . [ ]
f. Rape . . . . . [ ]
g. Armed Robbery . . . . . [ ]

Were other offenses tried in the same trial? yes [ ] no [✓]

If other offenses were tried in the same trial list those offenses.

a. _____

b. _____

c. _____

d. _____

If tried with jury, did the jury recommend the death sentence? Yes [✓] No [ ]

Statutory aggravating circumstances found: Yes [✓] No [ ]

Which of the following statutory aggravating circumstances were instructed and which were found?

	Instructed	Found
a. (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or	[ ]	[ ]
(2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	[ ]	[ ]
b. (1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery or	[✓]	[ ]
(2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[ ]	[ ]
c. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]

This should be in the transcript, but it was for killing a police officer.

d.	The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e.	The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f.	The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g.	The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[ ]	[ ]
h.	The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i.	The offense of murder was committed by a person in, or who has escaped from the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j.	The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

6. List nonstatutory aggravating circumstances indicated by the evidence, if any.

a. _____

b. _____

c. _____

d. _____

7. Was there evidence of mitigating circumstances? Yes [ ] No [X]

8. If so, which of the following mitigating circumstances was in evidence?

a. The defendant has no significant history of prior criminal activity. [ ]

b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. [ ]

c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act. [ ]

d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct. [ ]

e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor. [ ]

f. The defendant acted under duress or under the domination of another person. [ ]

g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [ ]

i. Other.
Please explain if (i) is checked _____

_____

_____

9. If tried with a jury, was the jury instructed to consider mitigating circumstances? Yes [✓] No [ ]

10. Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [✓]

11. Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [ ] No [✓]

12. Was the victim related by blood or marriage to defendant? Yes [ ] No [✓]

13. If answer is yes, what was the relationship? _____

_____

_____

14. Was the victim an employer or employee of defendant?
No [✓]
Employer [ ]
Employee [ ]

15. Was the victim acquainted with the defendant?
No [✓]
Casual Acquaintance [ ]
Friend [ ]

16. Was the victim local resident or transient in the community?
Resident [ ]
Transient [✓]

17. Was the victim the same race as defendant? Yes [ ] No [✓]

18. Was the victim the same sex as the defendant? Yes [✓] No [ ]

19. Was the victim held hostage during the crime?
No [ ]
Yes - Less than an hour [✓]
Yes - More than an hour [ ]

20. Was the victim's reputation in the community:
Good [✓]
Bad [ ]
Unknown [ ]

21. Was the victim physically harmed or tortured? Yes [✓] No [ ]
If yes, state extent of harm or torture: _____
Shot several times with rifle shot.

_____

_____

What was the age of the victim? 30 YRS

If a weapon was used in commission of the crime was it?

No weapon used	[ ]
Poison	[ ]
Motor Vehicle	[ ]
Blunt Instrument	[ ]
Sharp Instrument	[ ]
Firearm	[✓]
Other _____	[ ]

Does the defendant have a record of prior convictions? Yes [✓] No [ ]

If answer is yes, list the offenses, the dates of the offenses and the sentences imposed?

Offense	Date of Offense	Sentence Imposed
a. NOT IN this CIRCUIT		
b.		
c.		
d.		

Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [ ] No [✓]

Was the defendant a local resident or transient in the community?

Resident [ ]
Transient [✓]

D. Representation of Defendant *

Date counsel secured Not sure

How was counsel secured? a. Retained by defendant [✓]
b. Appointed by Court [✓]

If counsel was appointed by court was it because

a. Defendant unable to afford counsel? [ ]
b. Defendant refused to secure counsel? [ ]
c. Other (explain) Defendant was not sure he would be able to obtain Counsel

How many years has counsel practiced law?

a. 0 to 5 [ ]
b. 5 to 10 [ ]
c. over ten [✓]

What is the nature of counsel's practice?

a. Mostly civil [ ]
b. General [✓]
c. Mostly criminal [ ]

Did the same counsel serve throughout the trial? Yes [✓] No [ ]

If not, explain in detail I appointed Counsel and his family employed Counsel and he the same throughout the trial

(If more than one counsel served answer the above questions as to each counsel and attach to this report.)

E. General Considerations

. Was race raised by the defense as an issue in the trial? Yes [ ] No [✓]

. Did race otherwise appear as an issue in the trial? Yes [ ] No [✓]

. What percentage of the population of your county is the same race as the defendant?

a. Under 10% . . . . . [ ]
b. 10 to 25% . . . . . [ ]
c. 25 to 50% . . . . . [✓]
d. 50 to 75% . . . . . [ ]
e. 75 to 90% . . . . . [ ]
f. Over 90% . . . . . [ ]

. Were members of defendant's race represented on the jury? Yes [✓] No [ ]

. If not, was there any evidence they were systematically excluded from the jury? Yes [ ] No [ ]

. Was the jury instructed to exclude race as an issue? Yes [ ] No [✓]

. Was there extensive publicity in the community concerning this case? Yes [✓] No [ ]

. Was the jury instructed to disregard such publicity? Venue changed Yes [ ] No [ ]

. Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [ ]

. Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence? Yes [ ] No [✓]

. If answer is yes, what was that evidence? _____

_____

_____

. In your opinion, was the death sentence imposed in this case appropriate? Yes [✓] No [ ]

General comments concerning your answer: _____

_____

_____

F. Chronology of Case

		Elapsed Days
. Date of Offense	2-11-76	
. Date of Arrest	2-13-76	
. Date Trial Began		
. Date Sentence Imposed	6-15-78	

Date post trial motions ruled on _____

Date Trial Judge's Report Completed Oct. 24, 1978

*Date received by Supreme Court _____

*Date sentence review completed _____

*Total elapsed days _____

*To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached ( )
2. He stated he had no comments (x)
3. He has not responded ( )

Oct. 24, 1978
Date

Judge, Superior Court of

Cook County

I, Chloris Fuller, clerk of the Circuit Court of Cook County, do hereby certify the above and foregoing to be a true and correct copy of the original report of the trial judge.

26 Oct. 78
Chloris Fuller

this would be a mighty small population in this country. You do what's right and I'm sure you will go home and sleep better for it.

(STENOGRAPHER'S NOTE: All arguments being completed a short recess was taken, and immediately thereafter the law was given in charge by the Court as follows:)

CHARGE OF THE COURT

Now, ladies and gentlemen of the jury as I explained to you when we first began this case, you are not concerned with the guilt or innocence of the Defendant. That has already been decided by another court. That is no concern of yours whatsoever. The only thing you are concerned with is the punishment, because the guilt has already been decided by another jury.

Now, first, I will call your attention to the law. I charge you that in this case, as in all cases of trial before a jury in this state, the verdict of the jury must be unanimous. This means that the verdict must be the finding of each and every one of the jurors trying the case and if there is any juror who disagrees with the

verdict of the jury, it does not comply with the law with reference to the unanimity of the verdicts of petty jurors and should not be returned.

Now, ladies and gentlemen of the jury, there have been introduced into evidence statements which the State contends were made by the Defendant. If you find from the evidence that such statements have been made, and a part of such statement is harmful to the Defendant and a part of such statement is helpful to the Defendant or exculpatory in nature, you would not be authorized to accept such portion of the statement that tends to show the guilt of the Defendant and reject the part which tends to excuse the Defendant or show mitigating circumstances. But, you would be required to accept all of the statement if you accept any of the statement.

Now, ladies and gentlemen of the jury, you are made by law, the exclusive judges of the credibility of the witnesses and the weight you shall give their testimony. That applies to all the witnesses in the case. In determining their credibility, you may consider all the facts and circumstances of the case. You may consider the witnesses' manner of testifying. You may consider their intelligence. You may consider their means and opportunity they had of knowing the facts to which they testify. You may consider the nature of the facts to which they testify

You may consider the probability or improbability of their personal credibility insofar as the same may legitimately appear from the trial of the case.

I further charge you, ladies and gentlemen of the jury, that the law directs that it is your duty where it can be done, to so reconcile conflicting evidence if there be such in this case as to make all of the witnesses speak the truth so that perjury will be imputed to none of them. But, if there be evidence in the case in such irreconcilable conflict that this can not be done, you will accept that evidence most reasonable and credible to you. As I stated a moment ago, you are made by law the exclusive judges of the credibility of the witnesses and the weight you shall give their testimony.

Now, as to the impeachment of any witness, I charge you that to impeach a witness is to establish that he is unworthy of belief. When the believability of a witness is attacked, the jurors then must decide the truthfulness of the witness' testimony. When witnesses appear and testify, they are presumed to speak the truth and are to be believed by the jury unless it is established that they are unworthy of belief in some manner provided by law or otherwise contradicted in your judgment. That a witness is unworthy of belief and his testimony thus discredited, may be established by : Number one, disproving the facts

testified to by by him or her; Number two, by proof of contradictory statements previously made by him or her on matters relevant to his or her testimony in the case; or Number three, proof of his or her conviction of a felony.

Now, you are to weigh all the testimony and evidence supporting or discrediting a witness and at last say whether you will believe or disbelieve the testimony of the witness attacked. It is the exclusive function of the jury under all the circumstances of the case, to determine whether a witness' testimony is or is not believable. However, if you determine in your minds absolutely that a witness' testimony is impeached and thus discredited then it is your duty to disregard such testimony unless such testimony is corroborated, in which case you may believe the witness. It is always a matter for the jury to determine whether or not a witness has in fact been discredited.

Now, as I have previously pointed out to you in my preliminary instructions on the pre-sentence hearing on punishment in this case, a jury has found the Defendant guilty of the offense of murder and it is now your duty to determine within the limits prescribed by law the penalty that shall be imposed for that offense. In arriving at your findings as to the punishment you are authorized to consider all of the evidence recieved by you in open court

and this hearing on the question of punishment. You are authorized to consider all of the facts and circumstances of the case. Under the law of this state, every person found guilty of murder when the victim is injured shall be punished by life in the penitentiary or death by electrocution.

I charge you that in all cases for which the death penalty may be authorized, the law provides that the Judge shall instruct the jury concerning mitigating circumstances or aggravating circumstances which the jury may consider in making the decision which will determine the punishment to be imposed for each offense.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

Aggravating circumstances are those which increase the guilt or enormity of the offense or add to its injurous consequences.

The law provides that where upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that death

sentence should be imposed.

Where a statutory aggravating circumstance is found and the recommendation of death is made, the Court shall sentence the Defendant to death. Where a sentence of death is not recommended by the jury, the Court shall sentence the Defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of a statutory aggravating circumstance and recommends the death sentence in its verdict, the Court shall not sentence the Defendant to death.

I charge you that State contends that certain statutory aggravating circumstances exist in this case. The statutory aggravating circumstances which the State contends exist in this case are as follows. Now this will be out with you when you retire to consider the case. I will now read it. The offense of murder was committed against Police Chief James Edward Giddens, a peace officer while he was engaged in the performance of his duties. That's number one. Number two, the offense of murder was committed while the Defendant was engaged in the commission of another capital felony, to-wit: the kidnapping in Berrien County, Georgia of and bodily injury to James Edward Giddens a human being. Now, that will be the only two aggravating circumstances that you can consider in this case.

Now, in arriving at your verdict in this case, you will consider evidence as to the mitigating circumstances which the Defendant contends exist in this case. And, you will also consider evidence as to the statutory aggravating circumstances which the state contends in this case. If you find beyond a reasonable doubt that the Defendant has proved the existence in this case of either one or more of the aggravating circumstances as contended for by the State and as given you in charge by the Court, then, you would be authorized to recommend the imposition of a sentence of death, but, you would not be required to do so. If so recommend the imposition of a sentence of death the Court would be required to sentence the Defendant to death by electrocution. If you find beyond a reasonable doubt that the State has proved the existence in this case of one or more of the aggravating circumstances as contended for by the State and as given you in charge by the Court, you would also be authorized to recommend the Defendant to the mercy of the Court, which is a recommendation you may make either with or without a reason. You may make it for any reason that is satisfactory to you or without a reason. You may make it arbitrarily as a matter of course or as a matter of discretion.

If you recommend the Defendant to the mercy of the Court, the Court will be required to sentence the Defendant

to confinement in the State Penitentiary for and during the time of life. If you do not find beyond a reasonable doubt that the State has proved the existence of any one of the statutory aggravating circumstances about which the Court has charged you, you would so find, in which event you would not be authorized to consider the penalty of death. But, you would fix the punishment at life imprisonment and the Court would then be required to sentence the Defendant to confinement in the -- to the State Penitentiary for and during the time of life.

Your verdict must be in writing, dated and signed by some member of your body as foreman or forelady and entered in the separate -- on the separate sheets which have been attached to the Indictment. Now, that will be these two sheets here which I will send out with you with the Indictment.

In addition, I have prepared a worksheet with optional forms of verdict which I just showed you here -- there will be two forms here, which may be adapted to the sentences which you are authorized to make and after you have made a judgment as to the sentence to be imposed, you will use the wording on the forms as a guide to help you in writing out such sentence verdict on the separate sheets attached hereto which will be given to you with the Indictment.

Now these forms are furnished for your aid in reducing your findings to writing and only for such purpose and the fact that we are furnishing these forms to you and the order in which the optional verdicts appear on the worksheet or verdict forms are not intended to express any information or opinion as to what your verdict on sentence should be or which form you should use. These are matters that are entirely in your judgement and discretion based upon your unanimous finding as to what the punishment should be on each count of which the Defendant was convicted. And, I will give you these further instructions to illustrate the forms of verdict which you may use to reflect your findings. If you unanimously find beyond a reasonable doubt that one or more of the statutory aggravating circumstance as contended by the State and as given you in charge by the Court exists in this case, and you have determined to recommend the punishment of the Defendant by death, then the form of your verdict would be, "We, the jury fix the punishment of the Defendant, Son H. Fleming at death by electrocution " and then add, "We further find the following-" and of course, this is already fixed here, "We find the following aggravating circumstances to exist beyond a reasonable doubt" and you will then write out in your verdict the statutory aggravating circumstance or circumstances which you find to exist using the exact language

given you in charge by the Court which is on this sheet here. And, you would write that in, in number one and two here, which you find to exist using the exact language given you in charge by the Court and also repeated on the form of verdicts submitted to you, and following that language you would add down here "We recommend that the defendant be punished by death". That would mean that the Court would be required to sentence the Defendant to death by electrocution.

I charge you further that if you believe beyond a reasonable doubt the State has proved the existence of either one or more of the statutory aggravating circumstances about which the Court has charged you, you may recommend the Defendant to the mercy of the Court. In that event, the form of your verdict would be as follows: "We, the jury find the following statutory aggravating circumstance to exist in this case." And, you will then as indicated above write out in your verdict the statutory aggravating circumstance or circumstances which you find to exist using the exact language given you in charge by the Court which as above state, you will have out with you for reference. And, following that language you would add, "We recommend the Defendant to the mercy of the Court". That verdict would require the Court to sentence the Defendant to confinement in the penitentiary for and during the term of

life.

Now, on that you will have here -- we find the following aggravating circumstance. Now, you have two aggravating circumstances. You could find one or two or both, but which ever one you find or if you find both you have to write it in here the ones you find. Then, in parenthesis here if you recommend the death sentence, then you would leave that " We recommend that the Defendant be punished by death"and strike out the next sentence which is, "We recommend the Defendant to the mercy of the Court".

Now, if you do not give the death sentence and use the bottom one, then you will strike out the top line and use the bottom line and then date it and sign it by one of you as foreman or forelady if that's what you do.

Now, you have another form here which I'll come to in a minute. Now, the verdict would require the Court to -- The above forms of verdict involve the charges of murder embraced in the count -- embraced in the charge which -- in which a conviction carries the sentence of death by electrocution or confinement for life.

Now, as required by law, the instructions as to the aggravating circumstances about which the court has charged you, has been reduced to writing by the Court, which is on this page, and will be given to you for your use in your deliberations. To these are attached the suggested forms

of verdict on a sentence worksheet which are these two, which we have previously made reference, in which you will apply to your sentence findings, whatever they may be, if you choose to do so. Now, let me remind you again that your sentence as to punishment must be unanimous and the State has the burden of proving beyond a reasonable doubt, that one or more aggravating circumstances as we have outlined to you existed before you will be justified in fixing the death penalty in the case.

Now, another thing on this one , as I stated this one now reads, we the jury do not find any aggravating circumstances and recommend the Defendant's punishment at life and if that's what you find, you would use this form. Now, after you have reached your verdict -- after you have reached a verdict as to sentences -- if you have any difficulty in adapting your findings to the forms of the verdicts furnished, you -- furnished you by the Court on the sentence worksheet, call this to the Court's attention and in collaboration with counsel for the Defendant and the State, we will give you such assistance as we can.

Now, you will have these three out with you as well as the indictment here and then you use whichever one is appropriate ... that you find and strike out the wording that you do not need. As I stated you have two worksheets here for the verdict and then this is what you use to fill

in if you use that, and then this is the Indictment: With that you may now retire to the jury room and after deliberating for a certain period of time if you think that you will not be able to reach a verdict tonight, then report back to us and we'll make arrangements then to send you to the motel, but we'll let you go out and see what you can do.

(STENOGRAPHER'S NOTE: At this time the jury retired to the jury room to begin their deliberations. Mr. Zeesman makes the following objections to the charge of the Court.)

MR. ZEESMAN: Your Honor, this objection to the charge, we object to sending out the three pages, Your Honor contemplates, for the reason we believe that had a lot to do with the jury's sentence of death in Lanier County, the overwhelming power of suggestion. In addition, we think that the verdict on any case and especially capital, should be made by the jury itself even though the foreman is the one who writes it out or whoever does write it out, and we also object to the charge and ask the Court to correct it. Inadvertently, the Court said there were two aggravating circumstances -- made it sound like the Court says there are two. The Court didn't mean that and we agree that it didn't

that. But, we would ask them -- ask the Court to call the jury back and tell them that the Court did not mean to intimate that two are present. That's for them to find whether or not it's present. And in any event, I believe you've already said they could recommend life.

THE COURT: Well, of course, they have to have some way -- they have to write their own verdict and they have some guidelines to go by and that's the only way they can do it is with this. And of course, I instructed them I think, sufficiently enough that these are only the aggravating circumstances which the State contend.

(STENOGRAPHER'S NOTE: After deliberations, the jury returned to the jury box and the following transpired:)

THE COURT: Mr. Foreman, have you all reached a cerdict in this case?

JURY FOREMAN: Yes we have.

THE COURT: All right, will the Defendant rise and face the jury? Now, if the Foreman will, read the verdict.

JURY FOREMAN: We find the following aggravating circumstances, Number one, the offense of murder was committed against Police Chief James Edward Giddens, a peace officer while he was engaged in the performance of his duties. We also found Number two, the offense of murder

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6506

SON H. FLEMING, Petitioner

v.

SAM AUSTIN, Warden, Respondent.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

COMES NOW the petitioner Son H. Fleming and moves the Court for leave to proceed with his petition for a writ of certiorari to the Supreme Court of Georgia in forma pauperis and shows as follows:

1. Petitioner proceeded in forma pauperis in the habeas corpus proceedings below, and a copy of Mr. Fleming's Pauper's Affidavit filed therein is attached (Exhibit A); and

2. A duly signed and notarized Pauper's Affidavit will be filed herein as soon as possible. Petitioner is currently in prison in Georgia and petitioner's counsel resides in Massachusetts, and therefore the affidavit is being obtained from petitioner by mail. Said affidavit has not yet arrived.

3. An affidavit by petitioner's counsel is attached. (Exhibit B). Said affidavit of counsel avers that upon information and belief, petitioner is indigent and cannot pay any of the costs of this proceeding.

WHEREFORE, petitioner requests that he be allowed to proceed in forma pauperis.

Respectfully submitted,

Alan M. Dershowitz
20 Elmwood Avenue
Cambridge, MA 02138
(617)661-1965

Kathleen A. Harrison
NOTARY PUBLIC
My Commission expires
March 12, 1987

IN THE SUPREME COURT OF THE STATE OF GEORGIA

APPLICATION NO. 1333

SON H. FLEMING,

PETITIONER,

V.

SAM AUSTIN, WARDEN,

RESPONDENT.

PAUPER'S AFFIDAVIT

I, Son H. Fleming, the above-named petitioner and the applicant for a certificate of probable cause to appeal in this Court, do hereby make solemn oath that I am without money with which to pay the filing fees, court costs and any and all other costs necessary to this proceeding. I am in prison, and I own no property other than personal effects of little or no value.

Son H Fleming
SON H. FLEMING

SWORN TO AND SUBSCRIBED
before me this 4 day
of Aug., 1980.

Aaron Kogumore
NOTARY PUBLIC

EXHIBIT A

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

SON H. FLEMING, Petitioner

v.

SAM AUSTIN, Warden, Respondent.

AFFIDAVIT OF COUNSEL IN
SUPPORT OF PETITIONER"S MOTION
FOR LEAVE TO PROCEED IN FORMA
PAUPERIS

I, Alan M. Dershowitz, Counsel for petitioner in this proceeding, state that upon information and belief, petitioner is an indigent and is unable to pay any of the costs of this proceeding. This statement is based upon the following:

1. I communicated with petitioner's counsel in the State habeas corpus proceedings below, H. Diana Hicks, on the telephone on April 7, 1981. She has been in personal contact with petitioner and has confirmed that petitioner is indigent and unable to pay the costs of this proceeding.

2. No fees and expenses are being paid. I am representing petitioner on a voluntary basis without fees or expenses.

EXHIBIT B

I swear that the above is a true statement.

Alan M. Dershowitz
20 Elmwood Avenue
Cambridge, MA 02138
(617)661-1965

Counsel for Petitioner.

SWORN TO AND SUBSCRIBED

before me this 13th day

of April, 1981.

Kathleen A Harrison
Notary Public
My Commission Expires on March 12, 1987

NO. 80-6505

IN THE

SUPREME COURT OF THE UNITED STATES

80-6506

OCTOBER TERM, 1980

RECEIVED
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SON H. FLEMING,

Petitioner,

v.

SAM AUSTIN,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

BRIEF ON BEHALF OF THE RESPONDENT

HARRISON KOHLER
Assistant Attorney General
Counsel of Record

ARTHUR K. BOLTON
Attorney General

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Executive Assistant
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Please serve:

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Atlanta, Georgia 30334
(404) 656-3359

QUESTIONS PRESENTED

1.

Did the fact Petitioner did not fire the fatal shot render his death penalty disproportionate?

2.

Did the trial court correctly charge the jury concerning mitigating circumstances at Petitioner's second sentencing trial?

3.

Was the imposition of the death penalty at Petitioner's second sentencing trial constitutional?

4.

Did any constitutional error occur at Petitioner's committal hearing?

5.

Was the testimony of Ira Bass admissible?

6.

If Petitioner never exercised his Fifth Amendment right, was there any improper argument or questioning concerning his various statements?

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NO. 80-6505

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

SON H. FLEMING,

Petitioner,

v.

SAM AUSTIN,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Georgia

BRIEF ON BEHALF OF THE RESPONDENT

STATEMENT OF THE CASE

Farrell Kent, the owner of the Adel grocery store in Cook County, Georgia, was robbed by two men about 10:00 or 10:30 p.m. on February 11, 1976. (T. 183). One man had a nickel-plated .22 caliber pistol and the other man wore a dark ski mask which he later pulled up, revealing his face. (T. 184-185). Kent identified the two men as Larry Donnell Fleming and Henry Willis. (T. 187). The men stuffed money in a paper sack and also took a carton of Kool cigarettes. (T. 183, 189).

Mr. L. V. Dupree was chatting with Police Chief James E. Giddens in Ray City when a report came in on Giddens' radio that an armed robbery had just occurred in Adel. (T. 205-206). Giddens was due to retire the next day, February 12. (T. 154). A car passed with two visible black males,

one wearing some sort of cap; Giddens said he would check it out and be right back and then drove east in pursuit of the car. (T. 206).

A dispatcher at the police station got a call from Giddens reporting that he was stopping a red and white Ford, tag number GBO 282. (T. 218). This was Giddens' last communication. (T. 219). Meanwhile, Dupree waited for Giddens' return and then drove in the direction Giddens had taken. (T. 208). Less than a mile away, Dupree found Giddens' police car empty with the motor and the lights off. (T. 208, 211). A shotgun lay near the car. (T. 211).

Alerted on police car radios about Giddens' disappearance, several law enforcement officers joined the lookout for the red Ford. (T. 225, 243, 255, 276, 282). A car fitting the description was stopped in Brooks County by two deputies about 12:30 a.m. (T. 256, 257-258). The deputies, Willie Jones and Thomas Weaver, had the three occupants emerge and then searched the car. (T. 259-262, 284). Petitioner Son Fleming was identified as one of the three occupants. (T. 269, 284). A .357 magnum revolver, a nickel plated .22 revolver and a brown sack containing bills was found in the car. (T. 265, 266). It was discovered later that the .357 magnum had belonged to Giddens. (T. 156, 281, 293). A carton of Kool cigarettes was also found in the car. (T. 408).

Giddens' uniform shirt was discovered several hours later in Lanier County near Lakeland, Georgia, off the side of a road; Giddens' body was found in a nearby pond. (T. 298. 303).

An autopsy showed that Giddens had been shot several times. A .38 bullet had entered the left abdomen, exited and then entered the right arm. (T. 382-383). There were three gunshot wounds to his head, one each in his left and

right temple areas and one in his forehead between the eyes. (T. 372, 375-376). There was also an entry wound in the cheek which paired with an exit wound in the neck. (T. 376, 380). There were wads of ratshot beneath the forehead and temple wounds, and the left temple wound had penetrated the skull and brain. (T. 380, 381). Dr. James Dawson of the State Crime Lab, who performed the autopsy, believed that the bullet from this wound had entered the nasal cavity into the mouth and fell from or was spit from the mouth of the victim. (T. 390-391). The powder burns on the victim indicated that the weapon or weapons had been fired at a distance of 18 inches or less from Giddens' body. (T. 373, 386).

Crime Lab tests by a microanalyst revealed that the .38 bullet in the victim's arm and a .38 bullet found in a tree near the pond had been fired from Giddens' .357 magnum. (T. 397, 398). Further tests also showed that the patterns of ratshot and powder burns on the victim's head had been caused by the .22 pistol fired 18 inches or less away from the victim. (T. 400-401).

Further State testimony connected Petitioner with the events surrounding the murder. Terry Coney testified that Petitioner borrowed his 1969 red Ford on February 11 and had not returned it by the next morning. (T. 162, 164, 170). King West, Petitioner's uncle, received a visit from Petitioner about midnight on February 11. (T. 233). Petitioner told West that he had gotten wet and needed dry clothes, but West refused Petitioner's request and Petitioner left. (T. 235).

After Petitioner was found in the red Ford on February 12 and arrested, he made various statements to law enforcement officials. On February 12, Appellant told Detective Captain Billy Register of Valdosta that he was not with Larry Fleming or Henry Willis during the armed robbery or murder. (T. 317).

Petitioner claimed he was picked up by them just prior to the arrest. (T. 317). Petitioner told Register that he had been with a Robert Hall and a Turpentine Slim on February 11, and had also visited his uncle, King West. (T. 318). Investigating Petitioner's alibi, Register learned that Turpentine Slim didn't know Petitioner and that Hall had been in Florida for three years. (T. 319, 320). West told Register that Petitioner stopped by the night of February 11 to get clothes for someone named Larry who had fallen in a creek getting water for an overheated car. (T. 319).

On February 15, Petitioner signed a waiver of rights and made an exculpatory statement. (T. 415-17, 428).

On February 16, Petitioner made a statement in which he admitted to being with Larry Fleming and Henry Willis when Giddens stopped their car. (T. 321. 337). Petitioner, who was driving, showed his driver's license, then Giddens attempted to search the car. (T. 337, 338). Willis and Larry Fleming, Petitioner's nephew, grabbed Giddens and a struggle ensued. (T. 338-339). Larry Fleming then forced Petitioner to drive away while he and Willis each held guns on Giddens. (T. 340, 341). After Giddens told them he had called in their tag number, they let Giddens out. (T. 341-342). As Giddens ran, Larry Fleming shot him four times with the .357 and Willis fired a .22 revolver. (T. 342). Giddens fell into a pond crying, "I'm hit" and Willis and Larry Fleming followed him there. (T. 343). Petitioner claimed he heard the .22 pistol being fired. (T. 343). According to Petitioner, he was unaware of the robbery in Adel, and did not participate in Giddens' murder. (T. 348, 353). Petitioner stated he did what Willis told him because he was afraid of Willis and his nephew. (T. 321, 350).

Sheriff D. H. Alderman of Colquitt County who had known Petitioner all his life, talked to Petitioner on the 16th after advising him of his rights. (T. 431). Petitioner told Alderman that when Giddens found a bag of money in the Ford, Willis and Larry Fleming jumped Giddens and kidnapped him. (T. 432). Petitioner claimed he begged the two men not to kill Giddens, but they disregarded the advice. (T. 432).

Following a Jackson-Denno hearing on Petitioner's statements, the Court ruled that they were made voluntarily. (T. 439). The testimony regarding the statements was repeated in abbreviated form for the jury. (T. 446-449, 455-459, 461).

In addition to Petitioner's statements, the State offered the testimony of Ira Bass who was in the Cook County Jail with Petitioner on February 15. (T. 465). Bass testified that Petitioner admitted he drove a car to a store which Willis and Larry Fleming robbed. (T. 466-467). Later, when a policeman stopped their car, all three men, including Petitioner, struggled with the police officer and successfully took away his gun. (T. 467). Petitioner drove several miles; then they stopped and got out. (T. 467). When Giddens tried to run away, Petitioner took the .357 gun from his nephew and shot Giddens as he ran into the water. (T. 467-468). Petitioner's nephew and Willis then waded into the pond and shot the victim again. (T. 468). Petitioner drove to Valdosta and unsuccessfully requested dry clothes from his uncle. (T. 468). 1/

Petitioner's sole defense was his own testimony. Petitioner claimed that on February 11, he visited a Joe Binghamton after borrowing Coney's Ford. (T. 490, 492). Larry Fleming and his friend, Henry Willis, then borrowed the Ford from Petitioner. (T. 492). According to Petitioner, when he saw the two men later, they would not say where they had been. (T. 493). Petitioner's nephew needed dry clothes, so Petitioner drove

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1/ At his trial Henry Willis testified that Son Fleming drove the getaway car, decided what place would be robbed, helped overpower Giddens, and shot Giddens with the .357 magnum. (Willis T.T. 593-97). Willis testified he shot Giddens three

(cont.)

to his uncle's house to get some. (T. 493). Petitioner claimed that West did give him some clothes. (T. 493). On their return to Moultrie, two police officers stopped them and they were subsequently arrested. (T. 494). Petitioner denied that he had made any statement to Ira Bass regarding his complicity in a robbery or murder. (T. 495).

Petitioner was originally tried in January, 1977, found guilty of murder, and received the death penalty. However, his death penalty was vacated by the Georgia Supreme Court. Fleming v. State, 240 Ga. 142, 240 S.E.2d 828 (1977). He had a new sentencing trial and again received the death penalty. Fleming v. State, 243 Ga. 120, 252 S.E.2d 609 (1979), cert. denied, 444 U.S. 885 (1979).

In State habeas, Petitioner voluntarily dismissed his first petition prior to the scheduled hearing, thus effectively delaying State proceedings. At the hearing on the second petition, Petitioner's sole evidence was the brief filed on his first direct appeal.

Petitioner was denied State habeas relief by the Supreme Court of Tattnall County, and the Georgia Supreme Court denied a certificate of probable cause to appeal.

1/ (cont.)
times and Larry Fleming shot Giddens while Giddens was lying in the water. (Willis T.T. 598-99). However, in a previous statement to police, Willis said Larry Fleming had not shot Giddens. (Willis T.T. 350).

REASONS FOR NOT GRANTING THE WRIT

A. THE FACT PETITIONER DID NOT FIRE THE FATAL SHOT DOES NOT RENDER HIS DEATH PENALTY DISPROPORTIONATE.

Petitioner's novel premise is that if the State's evidence is disregarded and his self-serving testimony is accepted as true, the evidence fails to show Petitioner intended the death of the victim. However, conflicts in the evidence must be resolved in favor of the prosecution. Jackson v. Virginia, 443 U.S. 307, 326 (1979). The State's evidence showed that Petitioner shot and wounded the victim with a .357 magnum. Then Petitioner stood by while Henry Willis waded into the water and fired the fatal shots while the victim was lying helpless in the water.

The State's evidence shows that Petitioner shot the victim and intended his death. In Lockett v. Ohio, 438 U.S. 586 (1978), the accused was outside the pawnshop and in the getaway car when the fatal shot was fired. Therefore, Petitioner's case simply does not present the issue of the co-felon which the State's evidence showed did not intend the death of the victim.

B. THE TRIAL COURT CORRECTLY CHARGED THE JURY CONCERNING MITIGATING CIRCUMSTANCES AT PETITIONER'S SECOND SENTENCING TRIAL.

In his charge to the jury at the second sentencing trial the trial judge stated that the jury was authorized to consider all the facts and circumstances of the case. (Second T. 484). Mitigating circumstances did not constitute a justification for the crime but might be considered as extenuating or reducing the degree of moral culpability or blame. (Second T. 484). The jury was authorized to consider evidence as to the mitigating

circumstances Petitioner contended that existed in the case. (Second T. 486). The jury was also authorized to recommend a life sentence with or without a reason or for any reason that was satisfactory to the jury. (Second T.T. 486).

Since the jury was instructed they could impose a life sentence even if no mitigating circumstances existed, the jury was not precluded from considering any circumstance which Petitioner proffered as a basis for a sentence less than death. See Lockett v. Ohio, 438 U.S. 586, 604 (1978). There were no objections to the trial judge's charge, and there was no error concerning mitigating circumstances.

C. THE IMPOSITION OF THE DEATH PENALTY AT PETITIONER'S SECOND SENTENCING TRIAL WAS CONSTITUTIONAL.

At Petitioner's second trial the jury found two aggravating circumstances: the murder was committed against a peace officer in the performance of his duties, Ga. Code Ann. § 27-2534.1(b)(8); and the murder was committed while Petitioner was engaged in the capital felony of kidnapping with bodily injury. Ga. Code Ann. § 27-2534.1(b)(2). Therefore, Godfrey v. Georgia, ___ U.S. ___,64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) is inapplicable as that decision dealt with a case having as its sole aggravating circumstance that set forth in Ga. Code Ann. § 27-2534.1(b)(7). 2/

At Petitioner's trial the jury was charged that before the death penalty would be authorized, there had to exist an aggravating circumstance. (Second T.T. 484). However, even if the State proved beyond a reasonable doubt that an

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2/"The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

aggravating circumstance existed, the jury still was not required to impose the death penalty. (Second T.T. 486). Therefore, the jury had its discretion guided concerning imposition of the death penalty. See Gregg v. Georgia, 428 U.S. 153 (1976).

Although Henry Willis, who fired the fatal shots and received the death penalty, Willis v. State, 243 Ga. 185, 253 S.E.2d 70 (1979); cert. denied 444 U.S. 885 (1979), Larry Fleming did not. [3/] What Petitioner failed to mention in his brief was that the State could produce no evidence that Larry Fleming ever shot the victim. The State's evidence at Petitioner's trial and Willis' own testimony at his trial proved that Petitioner and Willis shot the victim. The only statement Larry Fleming shot the victim came from Willis, who had given a prior inconsistent statement. At his trial Larry Fleming testified that only Petitioner and Willis shot the victim, and Willis took the Fifth Amendment at Larry Fleming's trial.

D. NO CONSTITUTIONAL ERROR OCCURRED AT PETITIONER'S COMMITTAL HEARING.

Although Attorney Edward Parrish had not yet been appointed to represent Petitioner, Parrish was present at the committal hearing to hear testimony. (T. T. 333). There is no evidence Petitioner testified or gave any statement at the committal hearing. At the State habeas hearing Petitioner did not even tender the committal hearing transcript into evidence.

Petitioner had the burden of proof at his State habeas hearing, Walker v. Johnson, 312 U.S. 275, 286 (1941), yet he failed to produce any evidence as to what constitutional errors occurred at the committal hearing.

3/ Larry Fleming has not yet appealed to the Georgia Supreme Court.

E. THE TESTIMONY OF IRA BASS WAS ADMISSIBLE.

Petitioner was indicted July 15, 1976, and his attorney was appointed by the trial court August 24, 1976. [4/] Since Petitioner's conversation with Ira Bass occurred several months prior to indictment and appointment of counsel, the Sixth Amendment right to counsel did not attach. See United States v. Henry, ___ U.S. ___, 65 L.Ed.2d 115, 100 S.Ct. ___ (1980); Massiah v. United States, 377 U.S. 247 (1964). Therefore, the critical issue was whether or not Petitioner's statement to Bass was voluntary.

Bass was initially incarcerated on September 20, 1975, and charged with molestation of his stepchild. (Second T. 215, 298, 307). On February 9, 1975, he pled guilty to two counts of child molestation, and received a seven-year sentence, with four years to serve and the three-year balance probated. (Second T. 214).

Bass was in the Cook County jail on Friday, February 13, 1976, when Petitioner was placed there. (Second T. 281, 297). Petitioner initiated a conversation with Bass in which Petitioner admitted driving the getaway car during the robbery and shooting of Giddens. (Second T.T. 283-85). Bass apparently wrote a note to the Sheriff about Petitioner, but Bass testified that he did not talk to any law enforcement officers until after Petitioner told Bass what happened. (Second T. 294, 296-97).

Bass also testified that Petitioner made his statement on February 15, 1976, which was a Sunday, but that Bass talked with the Sheriff and GBI Agent Harold Greeson on Saturday

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4/ In its order the trial court found that Attorney Edward Parrish had already been investigating the case for several months and was familiar with the facts of the case.

afternoon, which would have been February 14, 1976 (Second T.T. 282, 288). Bass apparently was thinking that February 15, 1976, fell on a Saturday, for the testimony of GBI Agent Greeson established that the conversation with Bass occurred on February 15, 1976, at 5:30 p.m. (Second T.T. 315). Therefore, the statement of Petitioner to Bass occurred before Bass ever talked to law enforcement officers. Bass was not a government agent, his conversation with Petitioner was not a custodial interrogation, and Bass' testimony was properly admitted.

Prior to Petitioner's trial, State officers promised Bass that if he testified he would not be sent back to Reidsville, which is where Georgia's maximum security prison is located. (Second T.T. 295).

Prior to Petitioner's first trial in January, 1977, Bass had been incarcerated for sixteen months. (Second T.T. 215). Under Georgia's earned time law, which enables an inmate to earn a day off his sentence for every day of good behavior, Bass would have discharged from custody in two years, resulting in his release on September 20, 1977. See Ga. Code Ann. § 77-320.1.

After Bass testified in January, 1977, at the recommendation of the District Attorney, and sentencing judge, the State Parole Board reduced Petitioner's custodial sentence to February 9, 1977. (Second T.T. 195, 202). As a result of this action, Bass was released from custody seven-and-one-half months early.

There was no evidence that Bass was made any promises by the State concerning parole prior to Petitioner's first trial. At Petitioner's second trial the State placed in evidence all favorable action taken on Bass' behalf subsequent to Bass' original testimony. (Second T.T. 195, 202). Petitioner's

counsel had full opportunity to cross-examine Bass at the first trial and to cross-examine all witnesses concerning any favorable treatment of Bass.

There was no objection to the testimony of Bass, and no evidence was presented at the State habeas hearing to reflect that the State made a surreptitious promise of a shortened sentence prior to Petitioner's first trial.

F. SINCE PETITIONER NEVER EXERCISED HIS FIFTH AMENDMENT RIGHT, THERE WAS NO IMPROPER ARGUMENT OR QUESTIONING CONCERNING HIS VARIOUS STATEMENTS.

Whenever Petitioner was questioned by police officers, he gave statements, most of which were self serving. Petitioner originally told Detective Register that he was not with Willis and Larry Fleming during the commission of the armed robbery or murder; Petitioner alleged he had been with Robert Hall, and Turpentine Slim. (T.T. 317-18). On February 15, 1976, Petitioner gave an exculpatory statement to GBI Agent Greeson. (T.T. 415-17, 428). Then on February 16, 1976, Petitioner admitted driving the car and being with Willis and Larry Fleming during the murder and the kidnapping of the victim. (T. 321, 337-54). However, Petitioner said Willis and Larry Fleming at gunpoint forced Petitioner to remain at the scene. (T.T. 342). When officers asked Petitioner why he failed to make these facts known when he was stopped and first questioned by police, Petitioner replied he was frightened. (T.T. 346, 350).

At the guilt or innocence phase of his trial, Petitioner took the stand and testified that when he was initially arrested, [by Willie Jones and Thomas Weaver] Petitioner told the officers he did not know anything about a policeman. (T.T. 494).

There were Jackson v. Denno hearings at both the guilt phase of the trial and at Petitioner's second sentencing trial. (T.T. 313-356, 409-444; Second T.T. 229-48). At neither hearing did Petitioner take the stand to dispute law enforcement officers' testimony that the confession was knowingly and voluntarily given. However, in December, 1977, at the second sentencing trial Petitioner told the jury that Detective Register had beaten Petitioner. (Second T.T. 332).

In his closing argument the District Attorney argued that if Petitioner had truly been a coerced innocent bystander at the murder of Giddens, Petitioner would have said something to police when he was arrested. This argument was not a comment on Petitioner's exercise of his Fifth Amendment right as Petitioner never invoked his right to silence. The undisputed testimony is that Petitioner initially told police he knew nothing about the murder. It was only when Petitioner's alibi defense began to fall apart under the scrutiny of a police investigation that Petitioner admitted being present when the murder was committed but alleged he was a coerced innocent bystander. The District Attorney was entitled to argue all reasonable inferences to the jury, including the inference that an innocent bystander would have told the truth when he was arrested rather than lied. See United States v. Hager, 505 F.2d 737, 740 (8th Cir. 1974).

The trial court asked Petitioner why he had not mentioned the beating before and Petitioner said that he was scared. (Second T.T. 379-80). There is nothing unconstitutional about a judge's propounding questions to a witness. F.R.Evid. 614(b); see Moore v. United States, 598 F.2d 439, 442 (5th Cir. 1979).

Moreover, there was no objection at trial to the District Attorney's closing argument or the brief examination by the judge. Georgia law requires a contemporaneous objection, Hart v. State, 227 Ga. 171, 179 S.E.2d 346 (1971); and Petitioner's failure to make a timely objection precludes consideration in habeas corpus. See e.g. Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976).

CONCLUSION

For all the previously stated reasons, Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

No. 80-6506

SON H. FLEMING, Petitioner

v.

SAM AUSTIN, Warden, Respondent.

Reply Brief of Petitioner

THIS IS A CAPITAL CASE

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May 13, 1981

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Introduction

The State of Georgia's brief in this capital case makes several concessions which strongly support petitioner's request for review.

1) The State concedes that petitioner did not fire the fatal shots (p. 9)*/ and that the crucial question presented by the petition is "Did the fact Petitioner did not fire the fatal shot render his death penalty disproportionate." (p. i).**/ This is precisely the question left open by this Court in Lockett v. Ohio, 438 U.S. 586 (1978). It is presented squarely by this petition.

2) The State concedes that petitioner, an illiterate indigent facing the death penalty, did not have a lawyer appointed at his committal hearing. (p. 9). In an effort to show that petitioner was not specifically prejudiced by this constitutionally fatal omission--a legal irrelevancy in capital cases--the State makes the preposterous argument that the man who was eventually appointed to represent him (some three months later), happened to be in the courtroom during the hearing. The record establishes, however, that the subsequently appointed lawyer was present "for a fractional part of the hearing" solely "as a spectator" who "had nothing to do with that hearing." The State concession that petitioner was unrepresented at his hearing, coupled with what the record establishes, requires reversal under the clear holding of Hamilton v. Alabama, 368 U.S. 52 (1961).

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*/ "Henry Willis . . .fired the fatal shots. . ." (p. 9)

**/ As detailed infra at p. 2. the State correctly contends that there was testimony--entirely by the highly suspect cellmate witness--that petitioner may have wounded the deceased. But the jury was instructed that it could convict the defendant without believing that testimony, and it must be assumed--as a matter of law--that the jury did not believe that testimony and convicted petitioner on the basis of accessorial liability as it was invited to do by the trial court. See infra at pp. 2-3.

3) The State concedes that the cellmate-witness who testified against petitioner "was released from custody seven-and-a-half months early" as "a result of" the "recommendation of the District Attorney, and sentencing judge [in petitioner's case]." (p. 11). The State does not deny that this was a reward for his testimony. The most it is willing to state is that "no evidence was presented. . .to reflect that the State made a surreptitious promise of a shortened sentence prior to Petitioner's first trial." (p. 12, emphasis added). This falls far short of an unequivocal denial that a promise, assurance, or expectation was, in fact, given by the State or perceived by the witness. In the face of the fact that the witness took off and disappeared as soon as he was freed, the State's concessions that he did receive a shortened sentence at the recommendation of the D.A. and trial judge immediately after his testimony, raises the unmistakable inference that the events were not unrelated and the reward was not unexpected.

A. Petitioner was sentenced to death without any finding that he participated in the actual killing or intended the death of the victim.

In his opening brief, petitioner argued that the judge's instructions to the jury permitted them to convict petitioner of murder and sentence him to death without ever having to find that petitioner participated in the actual killing or intended the death of the victim. (Pet.'s opening brief 11-12). The government has chosen to ignore this argument and instead responded that the evidence was conflicting as to whether petitioner had shot the victim and that the conflict must be resolved in favor of the prosecution. (State's reply brief, p. 7).

Petitioner agrees that the evidence was in conflict and so stated in the opening brief. (Pet.'s opening brief, p. 8).*/

*/ However, the only evidence that petitioner participated in the shooting was the highly suspect testimony of Ira Bass. See petitioner's opening brief, at 8, 24-26.

However, petitioner is not asking this Court to resolve an evidentiary question. The point is rather that neither the judge nor the jury was required to resolve the issue before sentencing petitioner to death; and that the record of this case provides absolutely no information on how they would have resolved it, had they been required to do so. Under the judge's instructions, the jury was permitted to convict petitioner of murder under a theory of accessorial liability, and was then permitted to sentence him to death if they found that the victim was a police officer. (Pet.'s opening brief at 11-12). The State cannot properly ask this Court to affirm petitioner's death sentence on the assumption that the jury believed the testimony of Ira Bass--which was the only evidence that petitioner fired at the deceased. The far more likely assumption is that the jury disbelieved or ignored that highly suspect testimony and based its verdict on the trial court's invitation to convict on an accessorial liability theory. In any event, the law is clear that since the jury was permitted to sentence petitioner to death without ever finding that he participated in the killing or intended death, and in fact never made a finding as to either issue, the constitutionality of petitioner's sentence must be reviewed on the assumption that petitioner was never found to have participated in the killing or intended death. Bachellar v. Maryland, 397 U.S. 564, 569-571 (1970). This case thus raises squarely the issue left open in Lockett v. Ohio, 438 U.S. 586 (1978) as to whether petitioner's death sentence violates the Eighth Amendment. (See Pet.'s opening brief, pp. 13-14).

B. The Trial Court's minimal instructions on mitigating circumstances were constitutionally deficient.

Petitioner's opening brief argued that the jury was effectively precluded from considering mitigating circumstances

proffered by the defendant, in violation of the principles of Lockett v. Ohio, supra, because the judge devoted considerable discussion to aggravating circumstances presented by the State, devoted only two sentences to mitigating circumstances, and never mentioned the mitigating circumstances presented by the defense. (Pet.'s opening brief, at 14-16). The State's short response paraphrases what the judge said and implies that because the judge did not forbid the jury to consider mitigating circumstances, the principles of Lockett were satisfied. (State's brief at 7-8).*/

Surely the State would not argue that the dictates of Lockett would have been satisfied if the judge had made no mention of mitigating circumstances. Even under Georgia law, ". . .the jury must consider the mitigating and aggravating circumstances relevant to the defendant," Fleming v. State, 241 Ga. 42, 240 S.E. 2d 37, 41. Gregg v. Georgia, 428 U.S. 153, 192 (1976) clearly contemplates that the "jury should be given guidance in its decisionmaking."

The fact that the judge gave minimal instructions as to mitigating circumstances does not satisfy the constitutional imperatives of Lockett. As was pointed out in petitioner's brief, even these minimal instructions were overshadowed by the judge's extensive discussion of aggravating circumstances, thus implying to the jury that the judge considered mitigating evidence to be relatively unimportant. (Pet.'s opening brief at 16). This resulted in the effective preclusion of the jury's guided consideration of mitigating circumstances, a point to which the State has failed to respond.

*/ The State also erroneously contends that defense counsel did not object to the charge. (State's brief at 8.) In fact, objection was made and was overruled. (Petitioner's opening brief at 10).

C. The arbitrary imposition of the death penalty on petitioner violates the principles of Godfrey v. Georgia.

Godfrey v. Georgia, 100 S.Ct. 1759 (1980), reaffirmed the principles that the State must apply its capital punishment laws so as to avoid the arbitrary infliction of death and provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." Id. at 1764, quoting from Gregg v. Georgia, 428 U.S. 153, 188 (1976). The government does not dispute the fact that although petitioner, Larry Fleming, and Henry Willis were all convicted of the same crime, the jury in petitioner's case was charged as to an aggravating circumstance not charged in Larry Fleming's and Willis's cases, and the juries in the latter two cases were charged as to two aggravating circumstances not charged in petitioner's case.*/ Furthermore, the jury in Larry Fleming's case found the existence of two out of three statutory aggravating circumstances and sentenced him to life imprisonment, whereas the jury in Henry Willis' found the existence of all three and sentenced him to death. This arbitrary use of aggravating factors by the government, and its seemingly chance results, violate Godfrey, and cannot be made constitutionally acceptable by the State's assertion that ". . .the jury had its discretion guided concerning imposition of the death penalty," (State's brief at 9). Discretion guided by a roulette wheel does not meet the stringent requirements necessary when a decision is to be made between life and death.

The State attempts to justify petitioner's death sentence in comparison with Larry Fleming's life sentence for the same crime by claiming that there was no evidence that Larry Fleming

*/ The aggravating circumstances charged in the various cases related to the circumstances of the crime itself, and not to the individual circumstances of the defendants, such as prior felony records. There is thus no apparent reason why the juries were charged as to different aggravating circumstances.

shot the victim, while there was evidence that petitioner did.*/ First of all, the only evidence introduced by the State that linked petitioner to the shooting was Ira Bass's suspect testimony. More importantly, however, neither of petitioner's juries was required to base its decision on this point. (See supra at A). Petitioner's jury might have found him less culpable than Larry Fleming's did him, yet Georgia law allowed either jury to sentence either man to death on the basis of arbitrarily presented statutory aggravating circumstances,and without having to find that the one sentenced to die was more culpable than the one granted life. It is this capricious procedure, with results that provide no "meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not," that violates Georgia's constitutional duty, and petitioner's constitutional right.

D. The Lack of counsel at Petitioner's committal hearing requires reversal.

The State admits that petitioner was not represented by counsel at his committal hearing. (State's brief at 9.) Therefore, under Hamilton v. Alabama, 368 U.S. 52 (1961), petitioner's conviction must be overturned.

The State tries to mitigate this evidence of clear constitutional error by stating that petitioner's eventual trial counsel, Mr. Parrish, who was appointed several months after the hearing,

*/ Here, as on pages 5 and 6, the State attempts to make use of testimony allegedly given by Henry Willis at Willis' trial. This testimony was not presented at either petitioner's first trial nor his second, since Willis' trial took place after both of petitioner's trials. Furthermore, Willis did not testify at either of petitioner's trials, and petitioner's counsel has never had the opportunity to cross-examine Willis. The State's attempt to introduce new evidence at this stage of the proceedings, and particularly testimony that petitioner has never been afforded the opportunity to test by cross-examination, is comparable to appending newspaper editorials to its brief. The State's action is highly improper and unfair and references to testimony at Willis' trial should be disregarded by this Court.

was present at the hearing. (State's brief at 9, 10). However, Mr. Parrish made it clear, on the very transcript page referenced by the State, that he was not acting as petitioner's counsel at the time and only saw "a fractional part of the hearing." (Tr. 1 at 333). "I did not sit with counsel. I sat down as a spectator, which I was. And I had nothing to do with that hearing, nor did I receive copies of any confessions or admissions." Surely the chance presence of Mr. Parrish at part of the hearing cannot be deemed to have given petitioner the effective assistance of counsel to which he was constitutionally entitled at this admittedly crucial stage of the prosecution. See State v. Houston, 234 Ga. 721 (1976) (Georgia's preliminary committal hearing is a criticial stage of the prosecution, at which counsel must be appointed for an indigent defendant.) Whatever it was Mr. Parrish was doing during the "fractional part" of the hearing that he saw, he was not providing the effective assistance of counsel. The fractional presence of a spectator at a preliminary hearing cannot magically be transformed into the effective assistance of counsel by a subsequent appointment of that spectator as the defendant's trial lawyer.

E. The testimony of the State's cellmate witness raises serious constitutional issues.

The only evidence that petitioner personally participated in the actual shooting was a "confession" allegedly made by the petitioner to a white inmate (Ira Bass) the petitioner had never previously met. Petitioner contends that use of this testimony 1) violated his right to counsel when questioned by a government informant, U.S. v. Henry, 100 S.Ct. 2183 (1980), and 2) precluded a fair trial because the State did not disclose the arrangements made with Bass in return for his cooperation. Giglio v. United States, 405 U.S. 150 (1970). The reply brief's discussion of the Bass testimony errs in three important respects.

First, the State argues that petitioner's right to counsel "did not attach" because the alleged conversations occurred several months prior to appointment of counsel and indictment. The fact that the State erred by not appointing counsel until six months after petitioner was arrested and placed in custody can surely not serve to excuse the improper procedure by which the alleged statements were secured. At the time the statements were allegedly obtained, the indigent petitioner had been in police custody, and under arrest, for 36 hours before his transfer to the prison where the alleged conversations took place. The State's unexplained delay in providing counsel for six months following petitioner's arrest should not now be held against him on the issue of the surreptitious government investigation.

Second, the State mis-reads the record on the timing of petitioner's alleged disclosures to Bass. Bass's testimony on the alleged disclosures is clear--there was no confessional "statement", as the reply brief suggests (pp. 10, 11), but instead, a series of conversations over several days (Tr. 1, p. 468-69.) Bass's testimony at trial was that he contacted, and met with, prison officials on Saturday, February 14 (Tr.1, p. 470), only one day after petitioner was committed to the Cook County jail (Tr.2, p. 297). The next day, February 15, Bass met with the police and district attorney investigating the case (Tr.2, p.315). Once the notion of a confessional "statement" is discarded, the record establishes that most of the alleged conversations occurred after the meeting with prison officials, after the meeting with the police and district attorney, and while Bass was acting as a de facto government agent and informant.

Finally, the reply brief errs in claiming that "no evidence" exists (page 11) to support petitioner's claim that the government arranged an early release for Bass in return for cooperation at petitioner's trial. As the State now admits (for the first time), Bass's discharge--within 10 days after petitioner's first trial--was seven and one-half months early. The trial record establishes that the circumstances surrounding Bass's release were highly unusual (see petitioner's opening brief, page 25a). Petitioner had no opportunity to question Bass on

the terms of his release, because the State was unable to secure his presence as a witness for the second sentencing trial. Given this questionable discharge, the State surely has an obligation to make a forthright statement on the arrangements made with Bass, rather than to fault petitioner for an alleged failure to produce evidence of a deal from a missing government witness.*/

Conclusion

Petitioner vigorously asserts his total innocence of the crime for which he stands sentenced to die. His trial was a travesty. His legal representation was a mockery and a sham. If this petition is denied, he will be left on death row without an attorney. The spectre of an innocent, illiterate, black American facing death alone--without counsel--for a crime he did not commit after a trial at which he was not defended is difficult to imagine. Yet it will happen, because there are--to counsel's knowledge--no provisions for the appointment of counsel once the petitioner has exhausted his state remedies. Russ v. Moffitt 417 U.S. 600, 617 (1974).**/ This case is ripe for review and resolution by this Court now. Petitioner respectfully urges

*/ There is one important factual error in the State's brief that requires correction. On page 3, the government stated that "Petitioner told West that he had gotten wet and needed dry clothes. . ." (T. 235) Actually, West testified "He did mention about he needed some clothes. Said water got on him or something about water." (Id.) Later, West testified on cross-examination:

A: He [petitioner] didn't tell me about nobody got their clothes wet. He asked for the clothes.
Q: But, he asked for some clothes and his clothes was dry?
A: His clothes was dry but he asked for the clothes." [Tr. 1 at 240-41.]

**/ Counsel on this petition is a volunteer, out-of-state attorney who cannot continue to represent petitioner before the federal courts of Georgia. This case has already taken hundreds of hours of his time and has cost him many hundreds of dollars from his own pocket. Yet in the absence of volunteer counsel, this petition would have had to be sumitted pro se by an illiterate capital defendant. If this petition is denied, all subsequent petitions may have to be submitted by petitioner pro se, unless counsel is appointed or unless volunteer counsel is again secured.

this Court to grant the petition.

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